Supreme Court of the United States

OCTOBER TERM, 1942.

No. 853.

NELLIE C. BOSTWICK, JACKSONVILLE HEIGHTS IMPROVEMENT COMPANY, A FLORIDA CORPORATION, ET AL., PETITIONERS AND APPELLANTS BELOW,

VS.

BALDWIN DRAINAGE DISTRICT, C. T. BOYD, AND UNITED STATES OF AMERICA, RESPONDENTS AND APPELLEES BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

And

BRIEF IN SUPPORT THEREOF.

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To the Honorable, the Supreme Court of the United States:

Nellie C. Bostwick, a citizen of Duval County, Florida, and Jacksonville Heights Improvement Company, a Florida corporation with its principal place of business at Jacksonville, Florida, appellants below, respectively petitioning show to the Court:

SUMMARY STATEMENT OF MATTERS INVOLVED.

The government filed this suit to take 2,666 acres of land for a naval air field. The government's amended petition (R. 17 to 61) described forty-two parcels.

The petitioner, Nellie C. Bostwick, and petitioner, Jacksonville Heights Improvement Company, seek a review of the adverse decisions below with respect to their claims of title to the awards for four of these parcels, namely, Parcels 4, 5, 15 and 24. The respondent, Baldwin Drainage District, as an adverse claimant, filed an answer in the District Court (R. 61 to 73) claiming first as *lienor* for an accumulation of drainage district taxes far in excess of the awards made for said four parcels severally (R. 273) and, second, as *fee owner* of said four parcels severally, but the basis of the alleged fee ownership was not stated.

The answer of petitioners, Nellie C. Bostwick *et al.* (R. 81, 83), showed that she, Mrs. Bostwick, claimed title to Parcel 4 and the award therefor (and other lands) by virtue of a state court mortgage foreclosure decree of December, 1924, followed by a master's deed of February, 1925. The same answer (R. 85 and R. 215) also showed that the adverse claim of title by Baldwin Drainage District was based upon a federal court drainage tax foreclosure decree of December, 1928, followed by a special master's deed of March, 1931, to the Drainage District. The same answer (R. 84) showed that the petitioner, Jacksonville Heights Improvement Company, claimed title to the awards for Parcels 5, 15 and 24 (and other lands) by virtue of a deed of 1909, prior tc the formation of the Drainage District. The same answer also showed that the Drainage District claimed title to the last mentioned parcels by virtue of another federal drainage tax foreclosure decree (R. 315) of April, 1931, followed by a special master's deed in 1932 to the District.

The answer of petitioners, Bostwick and Jacksonville Heights Improvement Company *et al.,* by Sections II to XIII (R. 91 to 165) attacked the drainage tax liens claimed by the Drainage District, as applied to all parcels in which they severally were interested, on sundry grounds based on the state drainage law and based on the state and federal constitutions. The same answer by Section XIV (R. 165 to 194) attacked the validity of said federal drainage tax foreclosure decrees on numerous jurisdictional and other grounds as follows:

First. That the face of the records made in said former federal suits whereby a receiver was appointed to collect delinquent drainage taxes and made in the so-called ancillary foreclosure suits brought by the receiver, showed that when the interests and attitudes of the parties to the litigation were considered the Drainage District, a citizen of Florida, was in law aligned on the same side with the complaining coupon holder against alleged delinquent landowners, most of whom were citizens of Florida, with the result that the requisite diversity of citizenship was wanting.

Indianapolis v. *Chase National Bank,* 314 U. S. 63, 69, 86 L. Ed. 48, 50.

Second. That the answer of the Drainage District made in the former federal receivership suit and quoted R. 168 to 175, and the petition of the complaining coupon holder in that case and quoted R. 177 to 182, showed that the District wanted to do and had already done on April 15th, 1924, the same thing that the complaining coupon holder wanted done, namely, to sue certain large alleged delinquent landowners. Moreover, Sections 3, 6, 9 and 10 of said petition of the complaining coupon holder (R. 173 to 180) additionally showed that there was no "actual," "substantial" "controversy" existing or remaining between the complaining coupon holder and the Drainage District, with the result that no jurisdiction existed in the main

suit filed by the complaining coupon holder or in the so-called ancillary tax suits filed by the receiver.

Blacklock v. *Small,* 127 U. S. 96, 32 L. Ed. 70.

Boston & M., etc., Mining Co. v. *Montana Ore Purchasing Co.,* 188 U. S. 632, 643, 47 L. Ed. 629, 633.

Hamer v. *N. Y. Railways Co.,* 244 U. S. 266, 274, 61 L. Ed. 1125, 1130.

Mitchell v. *Maurer,* 293 U. S. 237, 79 L. Ed. 338, 4th headnote (L. Ed.).

Kelleam v. *Maryland Casualty Co.,* 312 U. S. 377, 85 L. Ed. 899, 2nd headnote (L. Ed.).

Third. That the only matter left in "controversy" between the complaining coupon holder and the drainage district, as appeared by the face of the records made in said former federal tax foreclosure proceedings, was merely the right of the coupon holder to have delinquent taxes collected through the instrumentality of a receiver pursuant to the remedy given by what is now Section 1493, Compiled General Laws of Florida (1927), rather than permit the Drainage District to act as plaintiff in that behalf or for the complaining coupon holder to be the plaintiff, all as provided for by what is now Section 1473, Compiled General Laws of Florida (1927). That the difference in value of such remedies, if any, was unsubstantial and insufficient to sustain federal jurisdiction.

Healy v. *Ratta,* 292 U. S. 263, 208, 270, 78 L. Ed. 1248, 1253-4.

McNutt v. *General Motors Acceptance Corp.,* 298 U. S. 178, 181, 184, 80 L. Ed. 1135, 1136, 1138.

Thomson v. *Gaskill,* 315 U. S. 442, 446, 447, 86 L. Ed. 951, 955-6.

Fourth. That by virtue of two sections of the state drainage law, namely, Sections 1473 and 1493, Compiled General Laws (1927), and by virtue of the final decrees in the receiver's tax foreclosure suits (see seventh ground of petition for rehearing) the complaining coupon holders

and the receiver were pursuing causes of action which belonged to the Drainage District and said tax foreclosure decrees quoted (R. 187-188 and R. 189-191) in express terms adjudged the awards thereof to belong to the Drainage District and that the same should be credited on its bids for the property if no one else bid the amount of the taxes adjudged together with interest, costs and other charges. Such a record made in the light of the state drainage law demonstrated that the Drainage District was at all times aligned on the same side of the litigation with the coupon holders and the receiver, thereby defeating federal jurisdiction to entertain tax foreclosure suits against Duval Cattle Company, Jacksonville Heights Improvement Company and other landowners who were citizens of Florida.

Indianapolis v. *Chase National Bank*, 314 U. S. 63, 69, 86 L. Ed. 48, 50, and cases cited in footnotes 1, 2 and 4.

Fifth. Section XV of petitioners' answer (R. 197 to 201) further showed, as to Jacksonville Heights Improvement Company, that the default tax foreclosure decree entered against it was additionally bad and not within the jurisdiction of the court because the receiver filed a bill claiming a right to collect only "instalment taxes" theretofore levied to service drainage bonds, whereas the decree as actually entered, but unknown to the District Judge, included void taxes levied for pretended "maintenance" purposes and that such void maintenance taxes constituted more than a one-sixth part of the decree.

Gage v. *Pumpelly*, 115 U. S. 454, 29 L. Ed. 449.
Reynolds v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464.

Many reasons for the invalidity of the pretended maintenance taxes are stated in Section X of petitioners' answer (R. 134 to 141).

Sixth. Section XVII of petitioners' answer (R. 201 to 210) further showed that the tax foreclosure decree entered

against Duval Cattle Company, 41 F. 2d 433, and quoted R. 187-188, was not binding on the petitioner Bostwick because she was not a party to that suit although she was since 1919 up to the date of the master's deed to her in February, 1925, a holder of mortgage bonds issued by Duval Cattle Company, and was thereafter the fee owner of Parcel 4 (and other land) for nearly four years more before the tax decree was entered against Duval Cattle Company in December, 1928. This question of parties and the question of their rights of redemption under the drainage law, were matters of state law and binding upon the federal court. See Rule 29, Florida Equity Rules, and

Griley v. *Marion Mtg. Co.*, 132 Fla. 299, 182 So. 297.

Dundee Naval Stores Co. v. *McDowell*, 65 Fla. 15, 61 So. 108.

Clark v. *Reyburn*, 8 Wall. 318, 19 L. Ed. 354.

In any event the petitioner Bostwick was not a purchaser *pendente lite* and the title she received by master's deed in February, 1925, related back to the date of the mortgage under which she held mortgage bonds, namely July, 1919.

Andrews v. *National Foundry & Pipe Works*, (7 C. C. A.) 77 Fed. 774, 36 L. R. A. 139. Certiorari denied 166 U. S. 721.

1 Freeman on Judgments (5th Ed.), Section 440, page 968.

Seventh. Section XVII-A of petitioners' said answer (R. 210-213) showed that if petitioner, Nellie C. Bostwick, was represented in the federal tax foreclosure case by the mortgage trustees provided for by the mortgage of July, 1919, joined as defendants with Duval Cattle Company, then the tax foreclosure decree was void for the further reason that said decree was obtained by fraud or mistake in that the receiver and his counsel either by design or mistake prevented said mortgage trustees from interposing good defenses to the tax suit and that the existence of

such valid defenses had lately been discovered after arduous and diligent search.

Pomeroy's Equity Jurisprudence (4th Ed.), Vol. 2, pp. 1921 and 1922.

3 Freeman on Judgments (5th Ed.), pp. 2520 and 2523. Also Sec. 1234, pp. 2571 and 2572.

Eighth. Section XV of petitioners' said answer set up that the federal tax foreclosure decrees were void also because the records made in said tax foreclosure proceedings were predicated upon former state decrees which were in turn void for matters appearing upon the face thereof.

Inter-River Drainage Dist. v. *Henson,* (Mo.) 99 S. W. 2d 865, 8th and 9th headnotes and supporting text.

1 Freeman on Judgments (5th Ed.), Sections 322 and 382.

Section XVIII of petitioners' answer (R. 213) together with prior sections presented a chain of facts and circumstances which made it inequitable and unscionable for the Drainage District to come forward as actor-plaintiff-claimant and maintain its fee title claim to the awards for these four parcels. To begin with, Section IV of the answer (R. 94) showed that the original state decree quoted R. 89 to 102 was void and ineffective to include these lands in the District. That is a question of state law now pending but not yet decided by the state courts.

Section V of the answer (R. 104) showed that the area of these lands was in one of four separate and distinct watersheds and that it was not consistent with due process or equal protection to enforce common burdens on these lands for large amounts of money spent or wasted in other unrelated watersheds. That question is pending in the state courts and undetermined.

Section VI of the answer (R. 112) showed that the notice quoted (R. 113) was inadequate to give the state court jurisdiction to confirm any assessments of benefits.

That question is pending in the state courts and undetermined. That question goes to the root of the whole matter for if there was no legal confirmation of assessments then there was never any legal tax of any sort levied against these lands.

Section VII (R. 118) showed that the pretended assessments of benefits as applied to these lands were so arbitrary, unreasonable and in violation of state law as to amount to a fraud upon the owners of these lands—$35 to $40 per acre as assessed benefits on swamp lands which obviously would be damaged and never benefitted by the proposed improvements. The jury found these same lands to have a value of $5 per acre.

Sections VIII and IX of the answer (R. 127 and R. 130) showed no legal levy of any total tax and no legal levy of any instalment tax because essential requirements of the original decree undertaking to form a District were lacking, making it impossible to follow the statute in making such levies. Those questions are further matters of state law now pending and undetermined by the state courts.

Section X (R. 134) showed many reasons for no legal maintenance tax, especially as applied to these lands, because improvements originally proposed were abandoned. Hence, no original construction and no maintenance. Moreover, pretended levies for maintenance were in part collected and then diverted to the payment of attorney's fees and costs in the receiver's tax suits, yet the District's claim of title is in part predicated upon that sort of pretense, illegality and fraud.

Section XI (R. 141) showed that the major part of the first bond issue got out as payment to contractors for work done under contracts that were illegal because not let by competitive bidding and void also because collusive and fraudulent. The same section shows changes, amendments

and abandonments in the plans of reclamation, all without any pretense of complying with the state law in that behalf.

Section XII (R. 151) showed that the second and third bond issues were both wholly illegal and fraudulent because predicated upon the illegal contracts above mentioned and predicated upon the illegal changes and amendments to the plans of reclamation. Also that said bonds were issued to contractors for work and money wasted in other watersheds. Those bond issues and also the first were all nonnegotiable bonds under the decisions of the Supreme Court of Florida such as

First State Sav. Bank v. *Little River Drainage Dist.*, 122 Fla. 304, 165 So. 48, and

State v. *Crandon*, 115 Fla. 153, 155 So. 667.

and Sections 6761 and 6763, Compiled General Laws of Florida, being parts of our Negotiable Instruments Law. To like effect are decisions of other states.

State v. *Little River Drainage Dist.*, (Mo.) 68 S. W. 2d 671.

Manker v. *Am. T. Co.*, (Wash.) 230 Pac. 406, 42 A. L. R. 1021.

Galt v. *City of Chicago*, (Ill.) 42 N. E. 2d 115.

Nevertheless installment taxes were annually levied from 1919 and 1920 to date of taking to service those void bond issues and such taxes are in part the basis of the fee title claim of the Drainage District now asserted with respect to the parcels of land in question.

Section XVIII-A of the answer (R. 210) showed that the illegalities and frauds described in Sections XI and XII of the answer were covered up by the Supervisors, the receiver and his counsel. That they were concealed during the tax foreclosure suits and that the mortgage trustees who were made parties along with Duval Cattle Company were prevented from finding out about those things so as to set them up as defensive matters.

Finally, Section XVIII of the answer (R. 213) showed that the Drainage District has suffered no injury or change of position by any delay. That it has paid no state and county taxes but beginning with 1937 it has received large royalties by way of rents on turpentine leases. That it has sold no lands because the state drainage law made it obligatory that it sell subject to all subsequent drainage tax levies. Hence no one would buy. When the government came along and took these lands for an air field then for the first time was it possible for anybody to get any money out of these lands. Upon the happening of that event the District and its majority bondholders J. W. Harrell (now of counsel for the District) and W. R. Schnauss, mentioned in the answer of petitioners (R. 216) and who bought up bonds at 5 cents to 10 cents on the dollar, come forward and claim the entire proceeds of these lands basing their claims on an alleged title derived from the long course of spoliation, illegality and fraud described in the answer of these petitioners. The decisions of the courts below failed to give any effect to the showing so made by the answer and in that behalf their decisions are probably in conflict with many decisions of this Court such as

Brownsville v. *Loague*, 129 U. S. 493, 32 L. Ed. 780.

Lawrence Mfg. Co. v. *Janesville Cotton Mills*, 138 U. S. 552.

Arrowsmith v. *Gleason*, 129 U. S. 86, 101.

Marshall v. *Holmes*, 141 U. S. 597.

Simon v. *Southern R. Co.*, 236 U. S. 115.

Also decisions of other Circuit Courts of Appeal such as

National Surety Co. v. *State Bank*, (8 C. C. A.) 120 Fed. 593, 61 L. R. A. 394.

Such conclusion is likewise probably in conflict with decisions of our state Supreme Court such as

Edenfield v. *Sayre*, 81 Fla. 367, 88 So. 607.

Finally, Section XX of petitioners' answer (R. 222) set up that the final decrees in the tax foreclosure suits imposed sundry unconstitutional conditions of sale and redemption and that the Drainage District and its bondholders through the very title claim now asserted are attempting to reap the benefits thereof contrary to numerous decisions of this court in such cases as

Clark v. *Reyburn,* 8 Wall. 318, 19 L. Ed. 354.

Brine v. *Hartford Fire Ins. Co.,* 96 U. S. 627, 24 L. Ed. 858.

Municipal Investors Assn. v. *City of Birmingham,* (Mich.) 299 N. W. 90. Affirmed by this court 316 U. S. 153, 86 L. Ed. 1341.

The Drainage District attacked the answer of petitioners and others by two motions. One motion (R. 257) was a motion to strike the answer in its entirety and as to all parties filing the same. The other motion (R. 263) was a motion to enjoin Nellie C. Bostwick and Jacksonville Heights Improvement Company from

> "claiming or attempting to claim any right, title or interest in the funds deposited by the United States as consideration for the taking of lands which were conveyed to Baldwin Drainage District."

That is to say, lands purportedly conveyed to the Drainage District by special masters as a result of the federal tax foreclosure decrees obtained by the receiver Hemphill.

The petitioners and others who had joined them in their said answer filed a motion (R. 265) asking that the court defer disposition of the motions filed by the Drainage District because the questions of state law and federal law were interwoven and interdependent and that the questions of state law raised by Sections II to XIII inclusive of said answer were then pending in a suit filed in the state circuit court.

While those said motions were pending a jury was called and made awards for all of the forty-two parcels in suit (R. 273). By consent of counsel the adverse claims of title were left for subsequent determination.

On July 16th, 1942, the District Court made two orders and one order (R. 274-275) was to the effect that the legal questions raised by petitioners' said answer, Sections II to XIII, inclusive, be postponed until the further order of the court because substantially the same questions were then pending before the state circuit court and had

> "not heretofore been settled by the Supreme Court of Florida."

The other order of the same date (R. 276, 282) treated the motion of the Drainage District for injunction as a motion for judgment on the pleadings and thereupon entered what amounted to a declaratory decree in favor of the Drainage District and adjudging its title to Parcels 4, 5, 15 and 24 derived through the former tax foreclosure decrees to be good and unassailable by anything set up in the answer of these petitioners.

Appeals were taken from that decree (R. 347-349) and on January 22nd, 1943, an affirming opinion was rendered by the Circuit Court of Appeals (R. 381 to 390) followed by an affirming judgment (R. 391).

The opinion of the Court of Appeals held in substance

First. That the original opinion of the district court reported as *Kreitmeyer* v. *Baldwin Drainage Dist.*, 298 Fed. 604, and the order appointing a receiver April 28th, 1924, and containing a recital of jurisdiction, were *res judicata* on the subject of jurisdiction, as to existing landowners and all who might thereafter claim through them, even though the Drainage District was then the sole defendant and no landowner had yet been sued. That holding was probably in conflict with numerous decisions of this Court.

> *O'Brien* v. *Wheelock,* 184 U. S. 450, 481, 483, 46 L. Ed. 636, 651, middle second column, 652 lower part first column.

Ocean Beach Heights v. *Brown-Crummer Investment Co.*, 302 U. S. 614, 616-618, 82 L. Ed. 478, 480-481.

U. S. v. *Pink*, 315 U. S. 203, 216, 86 L. Ed. 796, 810, 2nd headnote.

Proceeding from the premise last stated, the Court of Appeals next held that the petitioners' attacks on jurisdictional grounds and on grounds of fraud and mistake were all collateral attacks which could not succeed. Here again the opinion was probably in conflict with many precedents from this Court such as

Thompson v. *Whitman*, 18 Wall. 457, 21 L. Ed. 897.

Reynolds v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464.

Old Wayne Mutual Life Assn. v. *McDonough*, 204 U. S. 8, 20, 51 L. Ed. 345, 350.

Simon v. *Southern R. Co.*, 236 U. S. 115, 59 L. Ed. 492.

Adam v. *Saenger*, 303 U. S. 59, 62, 82 L. Ed. 649, 652.

Said conclusion that the attacks were collateral in character is apparently in conflict with decisions of other Circuit Courts of Appeal such as

Seay v. *Hawkins*, (8 C. C. A.) 17 F. 2d 710.

The conclusions thus stated in the opinion of the Court of Appeals as to *res judicata* and collateral attack prevented any decision on the merits of the jurisdictional questions raised by the answer of these petitioners and stated above beginning page 3. It is our belief that the opinion of the Court of Appeals is erroneous for other causes stated in the petition for rehearing (R. 392 to 401).

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, now 28 U. S. C. A., Sec. 347. The decree of the Circuit Court of Appeals was filed January 22nd, 1943 (R. 381). Petition for rehearing was filed February 8th, 1943 (R. 392) and same was denied February 12th, 1943 (R. 402). Application for stay order was filed February 25th, 1943 (R. 403), and an order was made on the same date (R. 406) staying the mandate of the court for a period of thirty days to permit filing of a petition for certiorari with accompanying record and if so filed until final disposition of the case by this Court. That this petition is being filed within the thirty days so allowed by said order and much less than three months after the date of said opinion and later order denying petition for rehearing. That the decree of said district court entered July 16th, 1942, affirmed by the Court of Appeals as aforesaid had such finality as to support said appeals and as to warrant writ of certiorari pursuant to this petition.

Reeves v. *Beardall*, 316 U. S. 283, 86 L. Ed. 1478.

QUESTIONS PRESENTED.

Upon the record and the opinion of the Court of Appeals as above explained several important federal questions are presented as follows:

A.—IS IT CONSISTENT WITH THE "LAW OF THE LAND" AND "DUE PROCESS" THAT LANDOWNERS BE HELD SUBJECT TO THE DOCTRINE OF *RES JUDICATA* BY A RECITAL OF JURISDICTION IN AN ORDER APPOINTING A RECEIVER WHERE SUIT WAS FILED AGAINST A TAXING DISTRICT AS SOLE DEFENDANT AND NO LANDOWNER HAD YET BEEN SUED?

The opinion of the Court of Appeals (R. 381, *et seq.*) answered this question in the affirmative. The recital of jurisdiction quoted in the opinion (R. 385) was taken from the order appointing the receiver and this fact was pointed out to the Court of Appeals by the second ground of the petition for rehearing (R. 393).

B.—MAY OWNERS OF LAND CLAIMED TO BE WITHIN A TAXING DISTRICT CONTEST ADVERSE CLAIMS OF TITLE WHERE SUCH ADVERSE CLAIMS ARE PREDICATED UPON ORDERS AND DECREES PREVIOUSLY ENTERED IN THE SAME COURT AND THE RECORDS IN SUCH FORMER PROCEEDINGS *SHOW ON THEIR FACE* THAT THE COURT WAS WITHOUT JURISDICTION?

In answering this question does it matter whether such contests on such ground be defined as a direct or a collateral attack?

The opinion of the Court of Appeals held that the recital in the order appointing the receiver closed the door upon these inquiries and that in consequence the attacks attempted by the petitioners were incompetent collateral attacks.

C.—CONCEDING THAT THE ORIGINAL BILL OF LOUIS KREITMEYER CITED R. 167 MADE A *PRIMA FACIE* CASE OF FEDERAL JURISDICTION DID THE ANSWER OF THE DRAINAGE DISTRICT THERETO QUOTED R. 168 TO 175 SETTING FORTH THE ATTITUDE AND INTERESTS OF THE DRAINAGE DISTRICT AND THE FACT THAT THE DISTRICT HAD ALREADY (R. 173) FILED A SUIT IN THE STATE COURT AGAINST DUVAL CATTLE COMPANY, OPERATE TO SHOW THAT THE DRAINAGE DISTRICT HAD THE SAME REAL INTERESTS AGAINST THE ALLEGED DELINQUENT LANDOWNERS AS DID THE COUPON HOLDER AND THAT THERE WAS IN FACT NO "CONTROVERSY" BETWEEN THE COUPON HOLDER AND THE DISTRICT SAVE A MERE MATTER OF REMEDY AS TO WHO SHOULD DO THE JOB OF SUING THE ALLEGED DELINQUENTS?

Did such a development by the answer defeat a *prima facie* showing of jurisdiction, if any, theretofore made by the bill and make it the duty of the district court under what is now Title 28, U. S. C. A., Sec. 80, to dismiss the bill?

The opinion of the Court of Appeals did not answer these questions except by holding that the recital in the order appointing a receiver was *res judicata* as to landowners not yet sued.

D.—DID THE PETITION OF LOUIS KREITMEYER QUOTED R. 177 TO 184 AND A LIKE PETITION BY THE INTERVENER WARREN E. BROWN, BOTH OF WHICH WERE FILED AFTER THE RECEIVER WAS APPOINTED BUT BEFORE HE SUED ANY LANDOWNER, HAVE THE EFFECT BY THE DISCLAIMERS CONTAINED THEREIN OF ELIMINATING ANY SUBSTANTIAL CONTROVERSY BETWEEN THE COMPLAINING BOND HOLDER AND THE DRAINAGE DISTRICT, WITH THE RESULT THAT FEDERAL JURISDICTION, IF ANY PRE-

VIOUSLY EXISTED, THEREUPON DISAPPEARED?

If any "controversy" was left after the complaining bond holders got the order quoted (R. 184) designating their attorneys as the attorneys to act for the receiver did such remaining controversy involving merely an election to proceed under what is now Section 1493, Compiled General Laws of Florida, instead of under what is now Section 1475, Compiled General Laws of Florida, have a value or amount sufficient to sustain federal jusrisdiction?

The Court of Appeals left these questions unanswered save by application of the doctrine of *res judicata* in the manner already stated.

E.—DID WHAT ARE NOW SECTIONS 1473 AND 1493, COMPILED GENERAL LAWS OF FLORIDA, PROVIDING TWO METHODS BY WHICH A COMPLAINING BONDHOLDER COULD ENFORCE A DISTRICT CAUSE OF ACTION FOR DELINQUENT DRAINAGE TAXES PLUS THE FORMS OF FINAL DECREES ENTERED IN THE RECEIVER'S TAX CASES AS QUOTED R. 187 TO 191 DEMONSTRATE THAT FROM THE OUTSET OF THE FORMER TAX LITIGATION THE DRAINAGE DISTRICT, A FLORIDA CORPORATION, HAD THE SAME INTERESTS AND WAS ALIGNED ON THE SAME SIDE WITH THE BOND HOLDERS ALL ADVERSE TO DUVAL CATTLE COMPANY, JACKSONVILLE HEIGHTS IMPROVEMENT COMPANY AND OTHER CITIZENS OF FLORIDA ALLEGED TO BE DELINQUENT PROPERTY OWNERS?

All these things appeared on the face of the former records but the Court of Appeals attached no importance thereto.

F.—DID THE RECEIVER'S BILL AND ITS EXHIBITS FILED AGAINST JACKSONVILLE

HEIGHTS IMPROVEMENT COMPANY AND QUOTED R. 282 TO 304 SEEKING TO COLLECT ONLY "ANNUAL INSTALMENT TAXES" FOR DEBT SERVICE PURPOSES, PURPORTEDLY LEVIED UNDER WHAT IS NOW SECTION 1468, COMPILED GENERAL LAWS, 1927, GIVE THE COURT JURISDICTION, UNWITTINGLY, AS SHOWN BY HIS FINDINGS (R. 309 to 314) TO ENTER A DECREE (R. 315 to 322) WHICH IN FACT FOR MORE THAN A ONE-SIXTH PART INCLUDED VOID PRETENDED "MAINTENANCE TAXES" SUPPOSEDLY LEVIED FOR MAINTENANCE PURPOSES PURSUANT TO WHAT IS NOW SECTION 1496, COMPILED GENERAL LAWS OF FLORIDA, 1927?

The Court of Appeals made no answer to this question save to note on page 5 of the opinion (R. 385) that thirteen years had elapsed since the suit was started by the receiver against Jacksonville Heights Improvement Company and that the company had not paid

> "or offered to pay the taxes for which the lands were sold or any of the taxes which were thereafter regularly assessed on the lands by the district."

whereas this holding assumed as against all that was alleged in Sections II to XIII of petitioners' answer that all the drainage taxes of every nature levied before the suit or since as against these lands were valid. The district court by the order (R. 275) had put aside all these attacks on the taxes as such to await state court action and no cross appeal was taken on that order.

G.—WAS THE DECREE IN THE *DUVAL CATTLE COMPANY CASE*, 41 F. 2d 433, *RES JUDICATA* AS TO MRS. BOSTWICK?

The Court of Appeals undertook to answer this question in the affirmative, pages 8, 9 and 10 of the opinion (R. 388 to 390). We believe the reasoning of the court is illogical and unsound. As to this we will say more in the appended brief.

II.—IF THE MORTGAGE TRUSTEES MADE DEFENDANTS IN THE DUVAL CATTLE COMPANY CASE REPRESENTED MRS. BOSTWICK FOR ALL PURPOSES FIRST AS A MORTGAGE BONDHOLDER BENEFICIARY AND SECOND AS FEE OWNER, INCLUDING HER RIGHTS OF REDEMPTION, MIGHT THEY OR MAY SHE ATTACK THE TAX FORECLOSURE DECREE FOR FRAUD OR MISTAKE IN THAT THE DISTRICT SUPERVISORS, THE RECEIVER AND HIS COUNSEL EITHER BY DESIGN OR MISTAKE PREVENTED THE MORTGAGE TRUSTEES FROM INTERPOSING GOOD DEFENSES SUCH AS THE MATTERS COMPLAINED OF IN SECTIONS XI AND XII OF PETITIONERS' ANSWER, WHICH MATTERS WERE ONLY LATELY UNCOVERED AFTER DILIGENT SEARCH?

The opinion of the Court of Appeals wholly omits to give any answer to this question though it was specifically raised by Section XVII-A of the answer and argued by brief.

I.—IF THE RECORDS MADE IN THE HEMPHILL TAX SUITS SHOW ON THEIR FACES THAT THE DECREES THEREIN WERE PREDICATED UPON STATE COURT DECREES, WHICH STATE COURT DECREES WERE IN TURN VOID ON ACCOUNT OF MATTERS APPEARING UPON THEIR FACES OR APPEARING UPON THE FACES OF THE RECORDS WHEREIN ENTERED, DO SUCH FEDERAL TAX DECREES FALL WITH THE STATE DECREES?

This question was propounded by Section XV of the answer and argued by brief, but the Court of Appeals left it unanswered. This is another matter where the federal question is interwoven with state questions now pending before the state court. If the state court now holds that the state court decrees complained of in Sections IV and VI of petitioners' answer (R. 94 and 112)

were void for reasons stated in those two sections, then what is left for the federal tax foreclosure decrees to rest upon?

J.—DOES THE ANSWER OF PETITIONERS POINT OUT, BY SECTIONS IV TO XIII INCLUSIVE AND BY SECTIONS XVII AND XVII-A, SUCH A CHAIN OF FACTS AND CIRCUMSTANCES AS MAKE IT INEQUITABLE AND UNCONSCIONABLE FOR THE DRAINAGE DISTRICT AND ITS BONDHOLDERS NAMED IN THE ANSWER (R. 216) TO RETAIN THE BENEFIT OF THE FEE TITLE CLAIMED BY THE DISTRICT?

This question is dealt with by one paragraph on page 8 of the opinion (R. 388). We think the reasoning of the Court of Appeals was erroneous and the point will be briefly discussed in the appended brief.

K.—DID THE FINAL DECREES OF TAX FORECLOSURE EXCEED THE JURISDICTION OF THE FEDERAL COURT, IF JURISDICTION EXISTED FOR ANY PURPOSE, BECAUSE OF THE INCLUSION OF UNCONSTITUTIONAL CONDITIONS OF SALE AND REDEMPTION?

This question was left unanswered by the Court of Appeals though presented by Section XX of petitioners' answer.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

First. Question A, propounded page 15, *supra*, shows how the Court of Appeals decided and applied the doctrine of *res judicata* in this case. The decision of the court on that point is in conflict with applicable decisions of this Court, such as *O'Brien* v. *Wheelock, Ocean Beach Heights* v. *Brown-Crummer Investment Co.*, and *U. S.* v. *Pink*, cited *supra*. Also *Kersha Lake Drainage Dist.* v. *Johnson*, 309 U. S. 485, 494, 84 L. Ed. 881, 887.

Second. Question B, stated page 15, *supra*, was decided by the Court of Appeals in a manner probably in conflict with applicable decisions of this court, such as *Thompson* v. *Whitman* and other cases cited immediately following the citation of that case, page 13, *supra*.

Third. Questions C, D and E, stated pages 16 to 17, *supra*, were left undecided by the Court of Appeals except by the general conclusion found in the opinion that the petitioners, appellants below, had not shown from the face of the former records that the court was without jurisdiction, but this general conclusion was predicated upon the premise that there was a recital or holding of jurisdiction contained in the order appointing the receiver when the Drainage District was the sole defendant. Such a conclusion is probably in conflict with applicable decisions of this Court, such as *Indianapolis* v. *Chase National Bank, supra, Blacklock* v. *Small, supra*, and *Healy* v. *Ratta, supra*. Moreover, questions C, D and E are important questions of federal law as to which lower federal courts should have definite guidance. Otherwise the dominant policy referred to in the case of *Indianapolis* v. *Chase National Bank*, and defined by successive acts of Congress with respect to diversity of citizenship will not be uniformly enforced.

Fourth. Question C, stated page 16, *supra*, raises an important federal question which apparently has not been but should be settled by this Court. That is to say, when the face of a former record made in the federal court shows that the "object of the suit" is the right to pursue a particular remedy rather than some other remedy equally efficacious, is the amount or value of the right to pursue the chosen remedy the test of federal jurisdiction rather than the amount of bonds or coupons which the complaining party has brought or could bring into the litigation? The principles laid down in *Healy* v. *Ratta, supra, McNutt* v. *General Motors Acceptance Corporation, supra,* and *Thomson* v. *Gaskill, supra,* should be applicable in a solution of this question but we have found no decision of this Court that squarely undertakes to determine jurisdiction by the value to the litigant of the particular remedy he has chosen as distinguished from another remedy equally efficacious or presumed to be equally efficacious. In our appended brief we have quoted material parts of what are now Sections 1473 and 1493, Compiled General Laws of Florida, in order to compare the two remedies which were available to Kreitmeyer, the complaining bond holder, and we will point out that under the one defined by Section 1473 a federal court plainly would have no jurisdiction. Also that the remedy under Section 1493 amounts to the same in substance.

Fifth. Question F, stated page 17, *supra*, was decided by the Court of Appeals in a manner probably in conflict with applicable decisions of this court, such as *Gage* v. *Pumpelly* and *Reynolds* v. *Stockton, supra.*

Sixth. Question G, stated page 18, *supra*, raises an important question of state law and was decided by the Court of Appeals in a way probably in conflict with state rules and state Supreme Court decisions, such as *Griley* v. *Marion Mortgage Co.*, 132 Fla. 299.

Seventh. Question H, stated page 19, *supra*, raises an important federal question. Namely, the validity of a

federal decree when procured by fraud, mistake or concealment, and the question was determined by the Court of Appeals in a manner probably in conflict with applicable decisions of this Court, such as *Simon* v. *Southern Railway*, 236 U. S. 115, and in conflict with eminent text writers such as 2 Pomeroy, pages 1921 and 1922, and 3 Freeman, pages 2520 and 2523, 2571 and 2572, cited *supra*.

Eighth. Question I, stated page 19, *supra*, points out inability of a federal court by its decree to give life and vitality to what were "dead limbs" on the state judicial tree. 1 Freeman on Judgments (5th Edition), Section 322.

Ninth. Question J, stated page 20, *supra*, invokes the inherent power of a federal court of equity to prevent an inequitable and unconscionable use of its own former decrees. The Court of Appeals' decision on this point is probably in conflict with applicable decisions of this Court such as

Lawrence Mfg. Co. v. *Janesville Cotton Mills*, 138 U. S. 552.
Arrowsmith v. *Gleason*, 129 U. S. 86.
Marshall v. *Holmes*, 141 U. S. 597.
Simon v. *Southern Ry.*, 236 U. S. 115.

Tenth. Question K, stated page 20, *supra*, was left unanswered by the Court of Appeals. That question propounds an additional reason why the former tax foreclosure decrees went beyond the jurisdiction of the court and hence should be vacated.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be named therein the full and complete transcript of the record and all proceed-

ings in the case numbered on its docket No. 10462 and entitled Nellie C. Bostwick *et al.* v. Baldwin Drainage District *et al.*, and that the decree of said United States Circuit Court of Appeals in said cause be reversed by this Court and that petitioners have such other and further relief in the premises as to this Court may seem just.

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Jacksonville, Florida,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 853.

NELLIE C. BOSTWICK ET AL., PETITIONERS,

VS.

BALDWIN DRAINAGE DISTRICT ET AL.,
RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1.

OPINION BELOW.

The opinion of the Court of Appeals filed January 22nd, 1943, appears in the transcript of record presented with this petition and brief, at pages 381 to 390. That said opinion has been or will be reported in 133 F. 2d 1.

2.

JURISDICTION.

A statement particularly disclosing the basis upon which it is contended that this Court had jurisdiction has been previously set out in the accompanying petition for writ of certiorari and need not be here repeated.

3.

STATEMENT OF THE MATTERS INVOLVED.

The foregoing petition for writ of certiorari, beginning on page 2 thereof, presents a "summary statement of matters involved" consisting for the most part in an analysis of the answer of petitioners filed in the district court. That statement pointed out that said answer was attacked by motion to strike and motion for injunction filed by the Drainage District. That the district court by an order and decree of July 16th, 1942, treated the motion for injunction as a motion for judgment on the pleadings and thereupon proceeded to give what amounted to a declaratory judgment of title in favor of the Drainage District. To avoid repetition that statement of the matters involved is re-submitted as a part of this brief.

4.

ASSIGNMENTS OF ERROR.

The adverse rulings of the Court of Appeals and the failures of that court to rule upon important questions have been shown by questions A to J stated in the foregoing petition for writ of certiorari followed by statements of what the court did or did not do with respect to said questions. We have in each instance indicated how and why we think the Court of Appeals was in error. To avoid further repetition we shall not undertake at this point to restate a complete assignment of errors and respectfully refer the Court to said questions A to J inclusive for a statement of the matters of which we complain. In the following argument we have restated as points what we regard as the chief errors committed by the Court of Appeals which warrant further comment supplementing the argument already included in the foregoing petition for writ of certiorari.

5.

ARGUMENT.

POINT I.

The court of appeals erred in holding that the recital or decision in favor of jurisdiction contained in the order appointing a receiver in the original case of Louis Kreitmeyer v. Baldwin Drainage District was res judicata as to landowners, because the Drainage District was then the sole defendant and no landowner had yet been sued.

This point is sustained by the following decisions of this court:

O'Brien v. *Wheelock*, 184 U. S. 450, 481, 483, 46 L. Ed. 636, 651, 652.

Ocean Beach Heights v. *Brown-Crummer Investment Co.*, 302 U. S. 614, 616-618, 82 L. Ed. 478, 480-481.

Kersh Lake Drainage Dist. v. *Johnson*, 309 U. S. 481, 494, 84 L. Ed. 881, 887.

U. S. v. *Pink*, 315 U. S. 203, 216, 6 L. Ed. 796, 810.

Stoll v. *Gottlieb*, 305 U. S. 165, 83 L. Ed. 104, does not apply here because Gottlieb who made the attack in a state court had previously filed a petition in the former federal court re-organization case, attacking federal jurisdiction and had gotten an adverse decision on that very point as a "contested issue." Here, no landowner was even a party to the Kreitmeyer suit when the receiver was appointed. Moreover, the answer of the Drainage District, quoted R. 169, *et seq.*, raised no question of federal jurisdiction but only that the amendment to the state statute providing for a receiver was void on account of bad title being contrary to Section 16, Article III, of the State Constitution.

Chicot County Drainage Dist. v. *Baxter State Bank*, 308 U. S. 371, does not apply. First, because the com-

plaining bank had accepted the benefits of the re-organization order under attack. Since the bank was not injured it was not such a party as could make the attack. *Heald v. District of Columbia,* 259 U. S. 114, 123. Second, the court on account of the particular facts involved, refused to permit the act to have "retroactive invalidity." That being the case the act under attack remained valid as to the attacking bank and the court's jurisdiction was consequently not impaired. Third, the attacking bank was before the court in the former re-organization proceedings as also in the subsequent case. Here the landowners were not present and no landowner had yet been sued.

If the Court of Appeals' decision as to what constitutes *res judicata* when applied to the original Kreitmeyer case is wrong, then, unless corrected, the evil thereof will be widespread throughout the States under the jurisdiction of that court. Already the Honorable Alexander Akerman, District Judge at Orlando, Florida, has announced that he regards himself bound by the *res judicata* doctrine as thus applied by the Court of Appeals and has announced that he will follow the same in another important case, but upon being advised that this petition is being presented he has further announced that he expects to withhold his decree until it is known whether the decision of the Court of Appeals in this case will be changed.

POINT II.

The court of appeals erred in giving no heed to the interests and attitudes of the Drainage District as set forth in its answer filed in the Kreitmeyer case and quoted R. 168 to 175 and in giving no heed to the disclaimers of Kreitmeyer and Brown contained in their petitions filed after they got the order appointing a receiver (quoted R. 177 to 184) **and in giving no heed to the language of the tax foreclosure decrees quoted R. 187 to 191, all showing by the face**

of the former records that no substantial controversy—no "Collusion of interests"—remained between the bondholders and the district and that the district was in effect on the same side with the bondholders in enforcing a district cause of action against alleged delinquent property owners.

The following decisions show that if any federal jurisdiction ever existed in these tax foreclosure proceedings it disappeared long before any masters' deeds were issued to the Drainage District. *Blacklock* v. *Small*, 127 U. S. 96. *Boston & M., etc., Mining Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 632, 643. *Hamer* v. *N. Y. Railways Co*, 244 U. S. 266, 274. *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69, and cases cited in footnotes 1, 2 and 4. In the *Blacklock case* and the *Hamer case, supra*, answers filed by a defendant showed that the interests of such answering defendant were on the same side as the plaintiff and that destroyed the *prima facie* showing of jurisdiction which had appeared by the bill. In the Boston & M., etc., Mining Co. case an answer was filed containing disclaimers of any controversy with the plaintiff on a substantial point and that too destroyed federal jurisdiction. The Indianapolis case and cases therein cited and in the foot notes reiterated and emphasized the necessity of a strict application of the acts of Congress restricting federal jurisdiction when it depended upon diversity of citizenship and that case reviewed most of the prior decisions pointing out the duty of the court, particularly under the Act of 1875, now Title 28, U. S. C. A., Sec. 80, to examine the pleadings and all parts of the record in a case to ascertain the interests and attitudes of the parties and to consider them as aligned on opposite sides according to their respective interests and attitudes so disclosed and if when that is done it appears that citizens of the same state are on opposite sides no federal jurisdiction exists. That is exactly what appeared by the face of the records made in the former federal tax foreclosure proceedings.

Additional matters of record set forth in Section XIV of petitioners' answer (R. 165 *et seq.*) additionally showed the mandatory duty of the court to have dismissed the tax proceedings. The failure of the court to act on its own motion or the failure of the defendants to invoke the law above cited did not make valid orders and decrees of the court otherwise void. 1 Freeman on Judgments (5th Edition), Section 322.

POINT III.

The court of appeals erred in disregarding the further point that under the state statute invoked by the bondholder Kreitmeyer he was required to prosecute and did prosecute a drainage district cause of action. The court also erred in failing to attach any significance to the fact that the records made in the tax foreclosure proceedings showed that the specific "object sought" by the complaining bondholders was to use the receiver process and remedy provided for by what is now Section 1493, Compiled General Laws of Florida, rather than other available remedies equally efficacious under what is now Section 1473, Compiled General Laws, and that the difference in value of said remedies to the complaining bondholders was unsubstantial and insufficient to sustain federal jurisdiction.

To make this point clear it is necessary to quote material parts of the statutes cited. Section 1473, Compiled General Laws of Florida, being Section 23 of the original drainage law, Chapter 6458, Laws of Florida, 1913, as amended by Acts of 1921 and 1923, provided in part as follows:

> "The board (meaning the Board of Supervisors) shall within twelve months after April 1st of each year institute a suit in chancery in the corporate name of the district against the land or lands upon which such drainage tax has not been paid in the county in which the property is situated * * * In case said district shall fail to commence suit within

> ninety days after the taxes have become delinquent, the holder of any bond or bonds or note or notes issued by the district shall have the right to bring suit for the collections of the delinquent taxes, in which event said district shall be included as a defendant, and the proceedings in such suit brought by any note or bondholder shall in all respects be governed by the provisions applicable to suits by the said district. * * * The proceeds of sale made under and by virtue of this Article shall be paid at once to the aforesaid treasurer and shall be accounted for by him the same as the drainage taxes."

Under this section a complaining bondholder could have brought a mandamus against the Supervisors to sue the alleged delinquents such as Duval Cattle Company, but as shown by the answer of the District filed in the Kreitmeyer receivership case, such mandamus was not necessary because the District (as appears R. 173) actually filed a suit against Duval Cattle Company on April 15th, 1924, which was thirteen days before the receiver was appointed. Under the section above quoted the bondholder could have sued the alleged delinquents in his own name, joining the Drainage District as a defendant, but any recovery in any such suit would have gone into the treasury of the District to be paid out pro rata on all valid delinquent coupons. In other words, the cause of action if so prosecuted by a bondholder would have been a district cause of action and the District necessarily would have been aligned with the plaintiff bondholder in interest even though named a defendant. In such a case a federal court would have had no jurisdiction. The Fifth Circuit Court of Appeals rightly so held in construing a similar Texas statute involved in the case of *City and County of Dallas Levee Improvement District* v. *Industrial P. Corp.*, 89 F. 2d 731 (5 C. C. A.). This Court held to like effect in *Hamer* v. *N. Y. Railways Co.*, 244 U. S. 266, 274. Other lower court cases to the same effect are cited with approval in foot note 1 to the case of *Indianapolis* v. *Chase National Bank, supra.*

Section 1493, Compiled General Laws of Florida, which was Section 41 of the original drainage act, Chapter 6458, Laws of Florida, 1913, and amended by Act of 1923, provided in part as follows:

> "If any bond or interest coupon on any bond issued by said district is not paid within sixty days after its maturity, a court of competent jurisdiction, on the application of any holder of such bond or interest coupon so overdue, may appoint a receiver for the district * * * the proceeds of taxes collected by the receiver shall be applied after payment of costs, first to overdue interest, and then to payment pro rata of all bonds issued by the said district which are then due and payable; and the said receiver may be directed to foreclose, by suit as hereinbefore provided, the lien of said taxes on said lands, and said suits, so brought by the receiver, shall be conducted as and governed by the provisions applicable to suits by the said district as hereinbefore provided, and with like effect."

It was under this statute that the bondholder Kreitmeyer and the intervener bondholder Brown undertook to proceed, but, as seen by the language of the statute, the prosecution of any such case was for the benefit of the District as a district cause of action. This is so because any moneys collected went into the treasury of the District to be paid out pro rata on all valid outstanding obligations.

What is now Section 1474, Compiled General Laws, which was Section 24 of the original Drainage Act of 1913 and amended by Act of 1923, is also pertinent in this connection and reads in part as follows:

> "All suits instituted under the preceding sections shall stand for trial as other equitable actions * * * in any case where the lands are offered for sale by the master, and the sum of the tax due, together with interest, costs and penalty, is not bid for the same, it shall be the duty of said board to bid the whole amount due thereon as aforesaid in the name of the district and the master shall sell same to such district, and such lands so bid in the name of the district shall,

> if subsequently confirmed in accordance with the above provision, become the property of the district in fee simple."

The provisions of this section were operative in connection with the portion above quoted from Section 1493, and this is demonstrated by the form of the final decrees entered in the Hemphill tax suits as quoted R. 187 to 191. The statute contemplated and those decrees contemplated that no private bidder would perhaps bid the amount of the taxes, costs, attorney's fees and other charges. Hence the statute provided and the decrees provided that any recovery obtained by the receiver would be regarded as belonging to the District and as entitling the District to credit therefor upon its bids for the property when put up for sale by the special master. It is plain therefore that the ultimate result that might be obtained through the instrumentality of the receiver and the benefit to a complaining bondholder was substantially the same as if he had proceeded under Section 1473 above quoted. The attorneys acting for the complaining bondholders knew this before they started. When they filed the disclaimer petition of Kreitmeyer or rather when he filed it in his own proper person (R. 177 to 182) there was nothing left in his case except his insistence that he have the services of a receiver to aid him in the enforcement of a district cause of action. In the case of *Johnson* v. *Riverland Levee Dist.*, 117 F. 2d 711, the Eighth Circuit Court of Appeals had under consideration the Missouri Levee Statute which is much the same as the Florida Statute, and the court distinctly held that a federal court had no jurisdiction or power to act as such tax collecting agency, but irrespective of whether that holding be controlling here the fact remains that the value of the remedial right insisted upon by Kreitmeyer was unsubstantial over and above rights he could have exercised under Section 1473, Compiled General Laws, above quoted. The value of his bonds or coupons was no longer in actual controversy but

only his insistence to use the receivership remedy and have his own counsel appointed to represent the receiver. Since such facts clearly appeared upon the face of the record the court had no jurisdiction. *Healy* v. *Ratta*, 292 U. S. 263, 208, 270. *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 181, 184. *Thomson* v. *Gaskill*, 315 U. S. 442, 446, 447.

The district court correctly held (R. 277) that he would take judicial notice of the records made in the former tax foreclosure proceedings. Those records including the parts pleaded in the petitioners' answer showed that the receivership remedy selected and insisted upon by Kreitmeyer was not efficacious. At bottom R. 185 it is alleged that the receivership continued for about ten years until March, 1934, but at no time was any accounting ever taken on the amount of bonds or coupons owned by Kreitmeyer or Brown and no judgment was ever entered on such accounting in favor of either. Again it is alleged (bottom R. 215) that the receiver was discharged in March, 1934, and all undisposed of tax foreclosure suits were dismissed. Also (R. 216) it is alleged that the present majority bondholders, J. W. Harrell and W. R. Schnauss, claimed to own bonds of the District, that is to say $520,000 par value out of a total of $560,000. These were the bonds formerly owned by Kreitmeyer and his associates and Warren E. Brown and his associates. Not a dollar of principal was ever paid on any bonds issued by the District. As a result of the real estate boom of 1925 the receiver made considerable collections but as alleged (R. 216) most of his collections were eaten up with attorneys' fees, receiver's fees and other court expenses. The remainder was applied towards interest on some of the bonds. The record therefore shows that the object of the receivership was a substantial failure though it lasted for a period of ten years. Duval Cattle Company lands were purportedly sold to the District by a special master and the same occurred with respect to Jackson-

ville Heights Improvement lands, but no money was realized from such sales and eventually the court concluded to dismiss the fruitless proceedings not yet concluded. Therefore the record demonstrates that the receivership remedy was no more efficacious than would have been the remedies provided by Section 1473, Compiled General Laws, above quoted.

POINT IV.

The court of appeals erred in holding that the court in Hemphill v. Jacksonville Heights Improvement Co., on a bill to collect "instalment taxes" levied under what is now Section 1468, Compiled General Laws, had jurisdiction to enter a decree, contrary to the court's findings, and without the court's knowledge, for amounts which included for more than a one-sixth part void pretended maintenance taxes levied under what is now Section 1496, Compiled General Laws.

This point is fully sustained by the record made in that suit. The bill is quoted R. 282 to 305 and is plainly confined to "annual instalment taxes." The same is true by the exhibits attached thereto. The findings of facts and conclusions by the court (R. 309 to 315) recite in several places that the findings appertain to "annual instalment taxes" only and yet it appeared by a part of the evidence filed, which apparently escaped the attention of the court, namely, the drainage tax books, sample page of which is shown R. 307, that annual maintenance taxes for three years were included in the amounts set up in the exhibits to the bill and were included in the amounts awarded by the decree, sample page of which as to descriptions and amounts appears R. 316. Thus the record clearly demonstrated that the decree by mistake of the receiver and the attorneys and the tax collector and by mistake of the court included an entirely different subject matter not sued for, to-wit, maintenance taxes, the invalidity of which is clearly demonstrated by the show-

ing contained in Section X of petitioners' answer (R. 134 to 141). In such circumstances the decree was clearly bad for want of jurisdiction and the attack thereon should have been sustained under the decisions of this court in *Gage* v. *Pumpelly,* 115 U. S. 454. *Reynolds* v. *Stockton,* 140 U. S. 254.

POINT V.

The court of appeals erred in holding that the decree in the case of Hemphill v. Duval Cattle Company et al., reported 41 F. 2d 433, was res judicata as to Mrs. Bostwick.

The mortgage trustees were *defendants,* not plaintiffs, in that suit. This eliminates the general rule ordinarily applied where such trustees are plaintiffs and sue to enforce the mortgage trust. Moreover that suit did not involve foreclosure of a railroad mortgage where bondholders are very numerous and widely scattered.

The rule of property in Florida applicable here is stated in Florida Equity Rule 29 and in *Griley* v. *Marion Mtg. Co.,* 132 Fla. 299. The Griley case cited and followed *Carey* v. *Brown,* 92 U. S. 171, and the Carey case in turn cited and followed the Virginia case of *Collins* v. *Lofftus,* 10 Leigh 5, 34 Am. Dec. 719. Alabama cases are to like effect. *Lebeck* v. *Ft. Payne Bank,* 115 Ala. 447, 22 So. 75. Also Wiltsie on Foreclosure (3rd Edition), Section 167, and 3 Jones on Mortgages (8th Edition), Section 1784, page 242.

When Mrs. Bostwick got her master's deed in February, 1925, the Duval Cattle Company lost all title and the mortgage trustees no longer had any trust to perform. Another rule applicable here is stated in *Andrews* v. *National Foundry & Pipe Works,* (7 C. C. A.) 77 Fed. 774, 777, 36 L. R. A. 139, 154, to the effect that since Mrs. Bostwick was a mortgage bondholder beneficiary she was not a purchaser *pendente lite* and her title related back to the date of the mortgage which was July, 1919. The Court of Appeals in this case gave no heed to that rule.

POINT VI.

If the trustees did represent Mrs. Bostwick in the Hemphill tax suit then the court of appeals was still in error in not holding that she had the right in this proceeding in equity to attack as she has done the tax decree for fraud or mistake arising from the fact that the supervisors, the receiver and his counsel either by design or mistake concealed from the trustees valid defenses now described in Sections XVII-A and XI and XII of petitioners' answer.

This proposition is sustained by many authorities such as Pomeroy's Equity Jurisprudence (4th Edition), Volume 2, pages 1921 and 1922. Also Volume 3, Freeman on Judgments (5th Edition), pages 2520, 2523, 2571 and 2572.

POINT VII.

The court of appeals erred in not sustaining the attack made by Section XV of petitioners' answer, namely, that the federal tax decrees were predicated upon void state decrees, the invalidities of which were pointed out in Sections IV and VI of petitioners' answer.

The invalidity of such decrees is well shown by Missouri decisions and those Missouri decisions are very pertinent because the Florida Drainage Act of 1913 was largely copied from the Missouri Drainage Law of the same year. The invalidity of the original decree here involved is shown by *Inter-River Drainage Dist.* v. *Henson,* (Mo.) 99 S. W. 2d 865, 8th and 9th headnotes and supporting text. The second decree undertaking to confirm assessments of benefits was also void because the notice intended to bind property owners did not comply with the drainage statute.

It would create an anomalous situation if the state courts now considering these questions hold that either or both of those state decrees were void. In any such event all of the drainage taxes claimed against the thirty-eight parcels not involved in these appeals would go out

in toto, yet under the decision of the Court of Appeals the Drainage District and its bondholders would be permitted to maintain their title to these four parcels here involved though that title was predicated upon the same totally void taxes.

POINT VIII.

The court of appeals erred in not sustaining the contention of petitioners to the effect that the chain of facts and circumstances set out in Sections IV to XIII and XVII and XVII-A of their answer made it inequitable and unconscionable for the Drainage District and its present majority bondholders to maintain the claim of title acquired in such manner.

This proposition is we think sustained by many decisions of this Court such as *Brownsville* v. *Loague*, 129 U. S. 493. *Lawrence Mfg. Co.* v. *Janesville Cotton Mills*, 138 U. S. 552. *Marshall* v. *Holmes*, 141 U. S. 596. *Arrowsmith* v. *Gleason*, 129 U. S. 86, 101. *Simon* v. *Southern Ry.*, 236 U. S. 115. These authorities are particularly applicable here because the Drainage District by its answer in this cause (R. 61 to 73) opened the door and invited the court to look behind the decrees relied upon by the District and consider its claims as *tax lienor* against all of the forty-two parcels involved in this suit.

POINT IX.

The court of appeals erred in giving no heed to the jurisdictional attack on the former tax decrees made by Section XX of petitioners' answer (R. 222 *et seq.*) **to the effect that said decrees went beyond the jurisdiction of the court by imposing sundry unconstitutional conditions of sale and redemption.**

The attacks made in that section are, we think, sustained by such cases as *Clark* v. *Reyburn*, 8 Wall. 318. *Brine* v. *Hartford Fire Ins. Co.*, 96 U. S. 627. *Municipal*

Investors Assn. v. *City of Birmingham,* (Mich.) 299 N. W. 90, affirmed by this Court 316 U. S. 153.

We now respectfully submit that the matters aforesaid amply warrant the issuance of writ of certiorari and the petitioners humbly pray that the same may be issued.

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SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1942

No. 353

NELLIE C. BOSTWICK, JACKSONVILLE HEIGHTS IMPROVEMENT COMPANY, a Florida corporation, et al.,

Petitioners and Appellants Below

vs.

BALDWIN DRAINAGE DISTRICT, C. T. BOYD and UNITED STATES OF AMERICA,

Respondents Appellees

BRIEF OF RESPONDENTS IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 853

NELLIE C. BOSTWICK, JACKSONVILLE HEIGHTS IMPROVEMENT COMPANY, a Florida corporation, et al.,

Petitioners and Appellants Below

vs.

BALDWIN DRAINAGE DISTRICT, C. T. BOYD and UNITED STATES OF AMERICA,

Respondents and Appellees Below

BRIEF OF RESPONDENTS IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

The opinion of the Circuit Court of Appeals in this case, 133 Fed. (2d) 1 (Adv. Op.) contains such a concise and clear-cut statement of the facts that are material to a consideration of the Petition for the Writ of Certiorari, that it is necessary to mention only one point that is not specifically mentioned. The Court of Appeals refers to the

decree of the District Court in Kreitmeyer against the District, and to the fact that the Court had expressly held

> "That this Court has and does now hereby take jurisdiction of the parties and the subject matter", (298 Fed. 604)

and also refers to the fact that a Final Decree of Foreclosure was entered in the ancillary suit of Hemphill as Receiver against Duval Cattle Company, which was affirmed June 30, 1930, by the Circuit Court of Appeals (41 Fed. (2d) 433). But it does not specifically mention the fact that in that suit the Defendants (Duval Cattle Company, and St. Paul Trust and Savings Bank and Beddall, Trustees under a mortgage given by the Cattle Company) moved to dismiss on the ground that

> "the Bill does not disclose jurisdiction in this Court to entertain this suit",

and the Court denied the Motion. So here Petitioners are attempting to attack collaterally, not only the decree in the primary suit of Kreitmeyer against the District, but also the decree in the ancillary suit brought by the Receiver against the Duval Cattle Company, (Petitioner Bostwick's predecessor in title,) under which the District obtained title to the land.

Jacksonville Heights Improvement Company, the other petitioner, did not contest the suit of the Receiver to foreclose taxes on its lands; but decree pro confesso was not entered against it until October 21, 1930, nearly four months after the Circuit Court of Appeals had affirmed the final decree in the Duval Cattle Company case, holding that the Court had jurisdiction of that case.

The opinion of the District Court in *Kreitmeyer vs. Hemphill,* 298 Fed. 604, and those of the Circuit Court of Appeals in *Kreitmeyer vs. Hemphill,* 19 Fed. (2d) 513 and *Duval Cattle Co. vs. Hemphill,* 41 Fed. (2d) 433, disclose the historical background of this suit.

The title of the Baldwin Drainage District in and to the lands of both Petitioners was acquired under deeds from Masters appointed by the District Court in the two ancillary foreclosure proceedings and were not executed until the one-year period of redemption allowed by law had expired. No appeal was taken from either Order authorizing the execution of those deeds. It is also true that no one questioned those decrees until the United States Government condemned the lands. Petitioners first raised these questions by answer to the Bill of Condemnation.

The decision of the Circuit Court of Appeals rests primarily upon its finding that the Bill of Complaint in Kreitmeyer against the District affirmatively showed the requisite diversity of citizenship; that the District Court had adjudicated that it had jurisdiction of that suit, and that no appeal was taken from its decision. However, we construe the opinion as also holding that the ancillary bills of Hemphill, Receiver against Petitioners showed that the District Court had jurisdiction of those cases. In the Duval Cattle Company case, the District Court so held when it denied the Motion to Dismiss, and the Circuit Court of Appeals affirmed that decision. In the ancillary suit of Hemphill against the Jacksonville Heights Improvement Company, the Court so held when it entered Decree Pro Confesso and the Final Decree. These decrees were

withheld until after the Circuit Court of Appeals affirmed the decision in the Duval Cattle Company case. The authorities cited by the Circuit Court of Appeals in its opinion, and from which it quotes, are conclusive that those decrees of the Federal Court, entered fourteen years ago, finally adjudicated that Court's jurisdiction of those cases.

The Circuit Court of Appeals also considered two other questions: (1) Whether Petitioners had alleged facts that showed that the District had used the tax foreclosure suits to obtain an unconscionable advantage over them. Petitioners have not raised this question in their petition or brief, and it is not urged as reason for the Writ. Even if it were, it is merely an issue of fact that would not support the Petition. (2) Whether Mrs. Bostwick, one of the Petitioners, can attack the Decree of Foreclosure against the Duval Cattle Company. The material facts that relate to this issue are summarized in the opinion of the Circuit Court of Appeals. That Court held that under the facts it was immaterial

> "whether she was or was not, through the mortgage trustees a party to the suit",

and that

> "We think she was a party".

The conclusion of the Circuit Court of Appeals on this point is predicated in large degree upon a statement of this Court quoted from its opinion in *Kersh Lake Drainage Dist. vs. Johnson,* 309 U. S. 485, 84 L. ed. 883, which case is now said by Petitioners to be contrary to the decision of the Court of Appeals.

Petitioners do not challenge the accuracy of the recital of facts in the opinion of the Circuit Court of Appeals. The "Questions Presented" by the Petition (pp. 2-13) and the supporting brief show that the Petition merely seeks to appeal from a decision of the Circuit Court of Appeals adverse to them.

All of the "Reasons" given for the issuance of the Writ (except one) rest upon the claim that the decision of the Circuit Court of Appeals is "probably in conflict with other decisions" of this Court. But an examination of the cases said to be in conflict shows that none of them involved the question decided by the Circuit Court of Appeals, and that none of them are in conflict with its decision. On the contrary, the cases cited by the Circuit Court of Appeals are direct and clear-cut precedents for its decision.

The other "Reason" given for the issuance of the Writ, is the claim of Petitioners that the decision that Mrs. Bostwick is bound by the Decree of Foreclosure in *Hemphill vs. Duval Cattle Company,* supra, is contrary to the law of Florida in *Griley vs. Marion Mortgage Company,* 132 Fla. 299. But the Court of Appeals considered that case and its opinion shows that the case is not applicable, because there the beneficiaries were known or named. Its decision rests upon the decision of this Court in *Kersh Lake Drainage Dist. vs. Johnson,* supra, that bondholders are not necessary parties where the trustee under the bond issue was a party and exercised its powers in good faith. *Kerrison vs. Stewart,* 93 U. S. 155, 23 Wall. 843, is also in point, because Mrs. Bostwick does not claim that she did not know of the foreclosure proceedings, or that she made any effort

to find out about them, or that she ever made demand upon the Trustee, or that the Trustee failed to make defense to the tax foreclosure suit brought by the Receiver. The record shows affirmatively that the Trustee did defend that suit. She is not claiming a right of redemption; she does not offer to pay taxes or to do equity. On the contrary, she seeks to nullify the foreclosure proceedings which resulted in a Final Decree affirmed by the Circuit Court of Appeals fourteen years ago, without offering any excuse for her failure to act in the meantime.

In addition to the cases cited in the opinion of the Circuit Court of Appeals, we cite *Evers vs. Watson,* 156 U. S. 527, 39 L. ed. 520, where the District Court had aligned the parties and sustained its jurisdiction. Plaintiff claimed that if the parties had been properly aligned, the Federal Court would not have had jurisdiction. This Court held that even if the District Court had been mistaken in its alignment of parties,

> "his decision in respect thereto would not be reviewable collaterally",

and that the Final Decree in the former case was

> "a valid bar to the suit under consideration".

We submit, therefore, that the decision of the Circuit Court of Appeals is not contrary to prior decisions of this Court, but, on the contrary, is in strict accord with them; that the decision of the Circuit Court of Appeals is not in conflict with the law of the State of Florida; that the District has not obtained an unconscionable advantage over Petitioners by reason of the deeds it obtained from

Masters of the Federal Court under the foreclosure decrees of the Federal Court twelve years ago. We contend that the position of the Petitioners is highly inequitable, and that they have no right to question the validity of the District's title in this action at this time and under the facts of this case.

Respectfully submitted,

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.....

Attorneys for Respondents and Appellees Below.

(27)

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 853.

NELLIE C. BOSTWICK, JACKSONVILLE HEIGHTS IMPROVEMENT COMPANY, A FLORIDA CORPORATION, ET AL., PETITIONERS AND APPELLANTS BELOW,

VS.

BALDWIN DRAINAGE DISTRICT, C. T. BOYD, AND UNITED STATES OF AMERICA, RESPONDENTS AND APPELLEES BELOW.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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SUBJECT INDEX

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REPLY BRIEF FOR PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

POINT I.

The court of appeals erred in holding that the recital or decision in favor of jurisdiction contained in the order appointing a receiver in the original case of Louis Kreitmeyer v. Baldwin Drainage District was res judicata as to landowners, because the Drainage District was then the sole defendant and no landowner had yet been sued.

Counsel for respondents do not attempt to contest the soundness of this proposition as applied to the original

order made in the *Kreitmeyer case,* opinion in which was reported 298 Fed. 604. The applicability of the group of four cases first cited page 27 of our petition and brief is not contested.

At page 2 of brief for respondents counsel attempt to bolster the holding of the Court of Appeals as to the original order appointing a receiver by quoting one ground of the motion to dismiss filed in the ancillary suit of *Hemphill* v. *Duval Cattle Company* that went to the Court of Appeals and was reported 41 F. 2d 433. The overruling of such a motion in the so-called ancillary suit cannot help, because jurisdiction had to exist in the main suit wherein the receiver was appointed or it didn't exist at all. Moreover the record in the suit of *Hemphill* v. *Duval Cattle Company,* judicially noticed by the District Court in this proceeding, showed by additional and supplemental grounds of the motion to dismiss and by briefs filed before the Court of Appeals that the only contention of a jurisdictional nature made in the ancillary suit was that Chapter 9129, Laws of Florida, 1923, undertaking to amend the Drainage Law by providing for the appointment of a receiver, was void in that same violated Article II and Section 27, Article III, of the State Constitution. No question was raised or discussed either in the lower court or in the Court of Appeals in the so-called ancillary suit as to lack of diversity of citizenship or as to the proper alignment of the parties. Furthermore, the so-called main suit had to stand on its own bottom and that bottom failed for reasons stated pages 3 to 5 of our petition and stated in Questions A to E, pages 15 to 17 of our petition. Counsel for respondents offer no answer to Questions A to E severally. They content themselves with the assertions of the Court of Appeals:

First, that the original Kreitmeyer order was *res judicata* as to landowners *not sued* and to *all the world,* and

Second, that the answer of petitioners as filed in the District Court was an incompetent collateral attack.

Counsel for respondents admit all that we showed by our petition for certiorari concerning *what appeared on the face of the record* in the original Kreitmeyer suit and in the so-called ancillary tax foreclosure proceedings.

The lapse of time noticed by counsel for respondents and the fact that no appeals were taken from the later orders in the ancillary suits ordering the issuance of master's deeds to the Drainage District are of no avail to sustain jurisdiction if jurisdiction did not originally exist or was lost by the disclaimers contained in the District's answer filed in the Kreitmeyer suit and quoted R. 168 to 175, or was lost by the disclaimers contained in the petitions of Kreitmeyer and the intervener Brown, quoted R. 177 to 182. A void decree gains no validity by the passage of time or by any action or non-action of parties or by subsequent orders of court. Nothing can operate to put life into what was and must remain a dead decree. 1 Freeman on Judgments (5th Ed.), Section 322. *U. S.* v. *Turner*, (8 C. C. A.) 47 F. 2d 86, 89.

POINT II.

The court of appeals erred in giving no heed to the interests and attitudes of the Drainage District as set forth in its answer filed in the Kreitmeyer case and quoted R. 168 to 175 and in giving no heed to the disclaimers of Kreitmeyer and Brown contained in their petitions filed after they got the order appointing a receiver (quoted R. 177 to 184) and in giving no heed to the language of the tax foreclosure decrees quoted R. 187 to 191, all showing by the face of the former records that no substantial controversy—no "Collision of interests"—remained between the bondholders and the district and that the district was in effect on the same side with the bondholders in enforcing a district cause of action against alleged delinquent property owners.

POINT III.

The court of appeals erred in disregarding the further point that under the state statute invoked by the bondholder Kreitmeyer he was required to prosecute and did prosecute a drainage district cause of action. The court also erred in failing to attach any significance to the fact that the records made in the tax foreclosure proceedings showed that the specific "object sought" by the complaining bondholders was to use the receiver process and remedy provided for by what is now Section 1493, Compiled General Laws of Florida, rather than other available remedies equally efficacious under what is now Section 1473, Compiled General Laws, and that the difference in value of said remedies to the complaining bondholders was unsubstantial and insufficient to sustain federal jurisdiction.

These points remain unanswered. The Court of Appeals gave no heed to these propositions. Counsel for respondents adopt the same course.

POINT IV.

The court of appeals erred in holding that the court in Hemphill v. Jacksonville Heights Improvement Co., on a bill to collect "instalment taxes" levied under what is now Section 1468, Compiled General Laws, had jurisdiction to enter a decree, contrary to the court's findings, and without the court's knowledge, for amounts which included for more than a one-sixth part void pretended maintenance taxes levied under what is now Section 1496, Compiled General Laws.

This point, stated page 35 of our petition and brief, remains unanswered. The basis for this point was clearly set forth in Section XVI of petitioners' answer, R. 197 to 201 (see page 5 of our petition).

At page 5 of the brief for respondents counsel assert that we do not challenge the accuracy of the recital of facts

contained in the opinion of the Court of Appeals. We cannot agree with that observation either as to what was stated and especially with reference to what was omitted. The Court of Appeals omitted any comment whatsoever as to what the former record showed on this point discussed pages 35 and 36 of our petition and brief. The court did, however, make an irrelevant observation to the effect that Jacksonville Heights Improvement Company had not paid or offered to pay any taxes. This was noted page 18 of our petition, but that observation even if it had been relevant, in the light of the contest made by petitioners against all drainage taxes, was no possible answer to Point IV of our brief or to Question F of our petition, pages 17 and 18.

To hold that the court had jurisdiction to award recovery of amounts that included void "maintenance" taxes under a different section of the Statute, when not sued for and when the District Judge didn't even know such taxes were involved, is in conflict not only with *Gage* v. *Pumpelly,* 115 U. S. 454, and *Reynolds* v. *Stockton,* 140 U. S. 254, but also in conflict with decisions by other circuit courts of appeal. *Goodrich Transit Co.* v. *City of Chicago,* 4 F. 2d 636, 1st headnote (7 C. C. A.), and *Osage Oil & Refining Co.* v. *Continental Oil Co.,* 34 F. 2d 585, 4th headnote (10 C. C. A.).

POINT V.

The court of appeals erred in holding that the decree in the case of Hemphill v. Duval Cattle Company et al., reported 41 F. 2d 433, was res judicata as to Mrs. Bostwick.

The brief for respondents, pages 4 and 5, undertakes to sustain the ruling of the Court of Appeals on this point. Counsel insist that the consideration given by the Court of Appeals to *Griley* v. *Marion Mortgage Company,* 132 Fla. 299, 182 So. 297, was correct

> "because there the beneficiaries were known or named."

We think that an entirely erroneous observation. The entire opinion of the Supreme Court of Florida in the Griley case fails to show whether the beneficiaries under the mortgage were known or unknown. Apparently the actual parties to the suit made no effort to name them and considered Marion Mortgage Company the only necessary party *plaintiff* when it brought suit to foreclose the original mortgage and considered its successor trustee as the only necessary party *defendant* when Griley, the assignee of the subsequent mortgage, brought suit to foreclose the same. The Supreme Court of Florida propounded this question:

> "Were the beneficiaries of the trust estate necessary parties to the foreclosure suit?"

The court then observes that they were not made parties to the suit and then stated the law of the subject as follows:

> "The law is settled that, in suits against the trustee affecting trust property, the trustees as well as the *cestuis que trustent* should be made parties defendant. *Carey* v. *Brown*, 92 U. S. 171, 23 L. Ed. 469."

Rule 29 of Florida Equity Rules cited in our former brief, page 36, adopted in 1873 and found in the preliminary part of Volume XIV of Florida Reports, page 47, still in force when the federal tax suits were brought, provides:

> "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it; *but in such cases the decree shall be without prejudice to the rights and claims of all the absent parties*" (Italics ours).

Thus for half a century prior to the bringing of the Hemphill tax suits this rule had been regarded as a rule

of property in Florida and the decision in the Griley case was an affirmation thereof.

Counsel for respondents also attempt to support the application which the Court of Appeals made of *Kersh Lake Drainage Dist.* v. *Johnson,* 309 U. S. 491. We think the application so made by the Court of Appeals was entirely erroneous as applied to the question of whether or not mortgage bondholder beneficiaries should have been named parties defendant to the Hemphill suit or some showing made that they were too numerous or were unknown. The Kersh Lake Drainage District case held as stated in the opinion of the Court of Appeals, but that holding related to the position of certificate holders, in substance bondholders, of the Drainage District in a suit where the Drainage District or rather its commissioners were *plaintiffs* in a suit brought to enforce drainage district assessment liens for the *benefit* of such certificate holders. The court in considering the position of the commissioners and of the certificate holders with respect to such a suit pointed out that the very statute under which the certificates were issued made it the duty of the commissioners to protect and enforce creditor's rights on obligations issued by the district. Here the Trustees under the mortgage were not the plaintiffs. Neither did they have such powers as the commissioners had in the cited case. Counsel for respondents have wholly omitted to take any note of the Kersh Lake case with regard to the proposition for which it was cited in our petition, because it was distinctly held on the last page of the opinion that *landowners were not bound* by former proceedings in which the district or its commissioners were parties but to which the landowners were not parties. Counsel have evaded that proposition and thereby, as previously observed, they have left wholly unanswered Point I as above stated.

The opinion of the Court of Appeals and the argument for respondents here wholly omitted, in discussing the

doctrine of *res judicata*, to recognize the necessity of at least four "identities" between this proceeding and the former tax foreclosure proceedings. In the case of *Lyon* v. *Perin & Gaff Mfg. Co.*, 125 U. S. 698, 700, 31 L. Ed. 839, 840, this court said:

> "It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, *viz.*: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality in the persons for or against whom the claim is made."

The Supreme Court of Florida has repeatedly held the same identities requisite. *Lake Region Hotel Co.* v. *Gollick*, 111 Fla. 64, 149 So. 205, 1st headnote. Here, as previously noted, the drainage district was the sole defendant in the suit brought by Kreitmeyer as an alleged coupon holder. The situation in the ancillary suit of *Hemphill* v. *Duval Cattle Company* was no better as respects parties, because Mrs. Bostwick was not and never became a party thereto and the Drainage District was not a party unless represented by the receivers. Again there was no identity of the thing sued for. The Kreitmeyer suit had for its sole object, when in effect amended by his petition (R. 177 to 182), the appointment of a receiver to collect alleged delinquent drainage taxes. The object of the answer of petitioners Bostwick and Jacksonville Heights Improvement Company (in effect an independent bill) was to have their titles to the deposits for the four parcels in question recognized and to have the counterclaims of title on behalf of the Drainage District resulting from the levy of illegal drainage taxes and receivership decrees therefor cancelled insofar as might be necessary to clear the way for the distribution of said funds to petitioners. Furthermore there was no identity of cause of action. Kreitmeyer sued to have a receiver appointed. The receiver sued to collect taxes. These petitioners by their answer sued to have the taxes declared illegal and the re-

ceivership decrees declared void because the taxes were wholly without authority and because the decrees were without jurisdiction and otherwise subject to attack. Many of the grounds set up by the petitioners in that behalf were recognized by the District Court (R. 275) as not heretofore

"settled by the Supreme Court of Florida"

nor settled by the district court.

Another principle entirely overlooked by the Court of Appeals and by counsel for respondents is stated in 30 Am. Jur., subject "Judgments," Sec. 233:

> "The general rule is that parties to a judgment are not bound by it in subsequent controversies between each other where they are not adversaries in the action in which the judgment is rendered * * * the theory of the many decisions supporting the general rule is that the judgment merely adjudicates the rights of the plaintiff as against each defendant and leaves unadjudicated the rights of the defendants as among themselves."

In the proceeding now before the court the petitioners as landowners are on one side and the Drainage District on the other. If they were adversaries in the Hemphill tax foreclosure proceedings, then the Drainage District, a Florida corporation, was the real plaintiff and that destroyed federal jurisdiction. If they were co-parties then according to the rule last above quoted the decrees therein were not *res judicata*. By either horn of the dilemma the opinion of the Court of Appeals was contrary to the decisions of this Court.

POINT VI.

If the trustees did represent Mrs. Bostwick in the Hemphill tax suit then the court of appeals was still in error in not holding that she had the right in this proceeding in equity to attack as she has done the tax decree for fraud or mistake arising from the fact that the supervisors, the receiver and his counsel either by design or mistake concealed from the trustees valid defenses now described in Sections XVII-A and XI and XII of petitioners' answer.

As an answer to this point counsel for respondents assert, pages 5 and 6 of their brief, that Mrs. Bostwick does not claim she did not know of tax foreclosure suit or that the mortgage trustees failed to make defense and that she does not offer to do equity by paying any tax, and so forth. That line of argument wholly fails to meet the attack stated as Point VI.

Section XVII-A, bottom R. 212, in effect makes Section XVII part thereof. Section XVII, bottom page 206 to 210, says in effect that *if* Mrs. Bostwick, then a married woman, was represented by the mortgage trustees, then she in their stead is still entitled to relief because

> "said receiver and his counsel either by design or by accident or by mistake withheld necessary documents and data and thereby prevented (said trustees) from making such defense as they otherwise would have made."

Details are then given as to matters and data and documents so withheld, following which it is further alleged, R. 209:

> "That the deception and concealment of the true facts thus accomplished first by the Supervisors and later by the receiver and his attorney precluded and prevented said mortgage trustees from making proper and adequate defense in said Duval Cattle Company case."

Circumstances are then alleged showing that petitioner (respondent Mrs. Bostwick) has not been lacking in diligence in discovering said matters. Section XVII-A of the answer, beginning R. 210, sets out further matters of illegality and fraud, knowledge of which was not discovered until the last few months before the filing of petitioner's answer. All those averments were admitted by the attacking motions of the Drainage District. In such circumstances a party standing in the position of Mrs. Bostwick, even if she through the trustees was represented in the tax foreclosure suit, is entitled to relief in equity by an original bill or any other proceeding equivalent thereto. Such a bill or its equivalent is a *direct attack* upon a decree obtained by the opposite party as the result of such concealment, irrespective of whether the concealment resulted from fraud, accident or mistake. Pomeroy and Freeman are cited to that effect, page 37 of our former brief. A recent leading decision from the Supreme Court of California to like effect is *Caldwell* v. *Taylor,* 23 Pac. 2d 758, 88 A. L. R. 1197, 4th and 5th headnotes. See also *Seay* v. *Hawkins,* 17 F. 2d 710 (10 C. C. A.). 1 Freeman on Judgments (5th Ed.), Section 308. 31 Am. Jur., subject "Judgments," Sec. 653.

We shall presently point out that since petition for certiorari was filed in this cause the State Court has rendered a decision squarely sustaining the defenses presented by Sections XI and XII of the answer filed by petitioners (respondents below), R. 141 to 163, and those defenses now held good by the State Court are the matters which were concealed by the supervisors, receiver and his counsel from the mortgage trustees during the course of the Hemphill tax foreclosure suit against Duval Cattle Company. The following rule stated in 3 Freeman on Judgments (5th Ed.), Section 1214, page 2523, is also applicable to Point VI now under discussion:

> "the judgment from which relief is sought does not operate as *res judicata* as to the matters adjudicated

by it where a party has been prevented from presenting his case by fraud, mistake or other matters affording ground for equitable relief."

POINT VII.

The court of appeals erred in not sustaining the attack made by Section XV of petitioners' answer, namely that the federal tax decrees were predicated upon void state decrees the invalidities of which were pointed out in said Section XV and prior sections cited therein.

This point was briefly discussed at page 37 of our petition and supporting brief. This point was also stated as Question I, page 19, of our petition, as follows:

> "I.—If the records made in the Hemphill tax suits show on their faces that the decrees therein were predicated upon state court decrees, which state court decrees were in turn void on account of matters appearing upon their faces or appearing upon the faces of the records therein entered, do such federal tax decrees fall with the state decrees?"

Since the filing of our petition the state circuit court has entered a decision in the case of *Macclenny Turpentine Company et al.* v. *Baldwin Drainage District et al.*, which we cited R. 110, R. 267 and R. 275. That decision we believe has a very material bearing on the solution of the question as last above restated.

We are attaching as Appendix A to this brief a certified copy of the subject index of the amended bill filed in the Macclenny Turpentine Company case. In connection with that index we shall point out how that bill presented the same subject-matter and the same questions which are presented by corresponding sections of petitioners' answer filed in this suit. We have next attached as Appendix B a certified copy of motion to strike attacking the several sections of said amended bill. Lastly we have attached hereto as Appendix C a certified

copy of the court order and decision rendered April 3rd, 1943.

This order and decision of the state court is we think important because this court in the case of *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 L. Ed. 109, held that the federal courts should follow the state courts in the interpretation of state statutes even though only a state chancery court had up to such time given such interpretation. In that particular case it was held that a decision by the court of chancery of New Jersey should be followed because as the matter then stood it could not be known that the highest state court would ever disapprove or overrule the decision of the chancery court. Under Section 11, Article V of the Florida Constitution, circuit courts in Florida stand next to the Supreme Court of the State and are given exclusive original jurisdiction

> "in all cases involving the legality of any tax, assessment or toll."

In the case of *West* v. *American T. & T. Co.*, 311 U. S. 223, 85 L. Ed. 139, and in *Six Companies of Cal.* v. *Joint Highway Dist., No. 13*, 311 U. S. 180, 85 L. Ed. 114, this court held that federal courts should follow the decisions of intermediate state courts in the construction and interpretation of state statutes. In Florida we have no such intermediate appellate courts. In *Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496, 85 L. Ed. 971, it was pointed out that a federal court in undertaking to give an interpretation of a state statute in advance of interpretation thereof by the state courts could only make

> "a tentative answer which may be displaced tomorrow by a state adjudication."

In *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 86 L. Ed. 1355, this court again held that until the state courts had spoken with regard to the meaning of the particular ordinance in question any determination by the federal court in regard thereto

> "could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois."

In the *Pullman Company case, supra,* 312 U. S., text 500, the court pointed out that the "tentative" or "forecast" character of a federal decision in such case was recognized by the rulings made in *Glenn* v. *Field Packing Co.,* 290 U. S. 177, and *Lee* v. *Bickell,* 292 U. S. 415. On turning to the Glenn case we find that it was an attack upon an excise tax imposed on oleomargarine by the State of Kentucky and that the district court had held the tax invalid. This court modified the decree by directing that a provision be inserted therein to the effect that the State Tax Commission

> "may apply at any time to the court below, *by bill or otherwise,* as they may be advised, for a further order or decree, in case it shall appear that the statute has been sustained by the state court as valid under the state constitution" (Italics ours).

In short, the door was to be left open for a change in the federal decision "by bill or otherwise" in the event the state court should put a different interpretation upon the statute. *Lee* v. *Bickell* was a similar case where an attack was made upon a state excise tax statute. The district court sustained the attack upon the statute but in support of the 5th headnote this court pointed out that

> "the parties to the controversy should have adequate protection in the possible contingency of a decision by the Supreme Court at variance with ours in respect of the meaning of the statute, a meaning that will then be declared with ultimate authority. * * * There should be an appropriate opportunity in such circumstances to terminate or modify the restraints of the decree. *There should also be an opportunity to renew the litigation in respect of the issue of constitutional validity*" (Italics ours).

The Glenn case was then cited for the appropriate practice. The case of *Wald Transfer & Storage Co.* v. *Smith,*

290 U. S. 602, 78 L. Ed. 528, was a similar case. It was there ordered that the previous decrees entered by the district court should be modified by providing that the appellants might

> "apply *at any time* to the district court, *by bill or otherwise*, as they may be advised, for a further order or decree, in case it shall appear that the state court shall have construed the applicable state statute as not authorizing the State Commission to enter the orders challenged in this proceeding" (Italics ours).

In the case at bar the petitioners filed a motion in the court below, R. 265, requesting the court to defer consideration of the motion to dismiss and motion for injunction filed by the Drainage District on the ground, R. 267, that the Macclenny Turpentine case was then pending before the state court and that the questions concerning the true interpretation of the statute would have a material bearing upon all the questions presented by the answer of these petitioners and that the questions appertaining to the former federal tax foreclosure decrees were interwoven with the questions attacking the validity of all taxes levied by the Drainage District and we cited the Pullman Company case and the Field case. The court below made two orders resulting from that motion. One, R. 274, 275, deferring the consideration of all questions, pending the state court decision, relating to all parcels not affected by the former federal tax foreclosure decrees. By the second order, beginning R. 276, the court undertook to segregate the four parcels affected by the former tax foreclosure decrees from the other thirty-eight parcels and proceeded to make a declaration of title in favor of the Drainage District without waiting to find out what would be the state court's interpretation of the statute in the sundry particulars raised by the answer of these petitioners. Appeals were taken from that second order and now since the taking thereof we have the state court's interpretation of the statute in many particulars. These

petitioners are now entitled "by bill or otherwise" to have the decree appealed from vacated and also to have the tax foreclosure decrees vacated so that these petitioners affected by said tax decrees may stand on the same footing as other landowners interested in the other thirty-eight parcels involved in this proceeding.

The decisions of the Supreme Court of Florida are in harmony with the decisions of this court last above cited to the effect that if taxes or assessments are initially sustained under a particular statute as against particular properties but afterwards it is determined that such statute is unconstitutional, then the owners of properties affected by such former decree will be entitled to relief by original bill after the time for appeal from the former decree has elapsed, to the end that all taxpayers may have equal treatment under the law consistent with Sections 4 and 12 of the State Bill of Rights and consistent with the equality provisions in tax matters contained in Section 1, Article IX, of the State Constitution.

In this behalf we cited *In re Newkirk,* 114 Fla. 562, 154 So. 323, 4th headnote. The 3rd headnote of this case and the text relating thereto concedes as a general proposition that a decree based upon an unconstitutional statute is not later open to collateral attack. Nevertheless as applied to the imposition of taxes the rule of property in Florida, as shown by the Newkirk case, is to give relief by bill in equity if it is subsequently determined that the statute undertaking to impose the taxes was in fact unconstitutional. The Newkirk case has been followed in several subsequent decisions, notably in *Jackson Grain Co. v. Lee,* 139 Fla. 93, 190 So. 464. There the particular excise tax statute was held void or inoperative as to the business of the complaining party, but afterwards the court in another case held the statute applicable to that particular class of business. Thereupon the State Comptroller acting for the state filed a bill and got the original decree

vacated, the court laying down this general principle, 1st headnote:

> "All persons, firms and corporations of Florida are equal before the law and especially is this true on the question of assessment and collection of taxes."

According to the decision of the state court now rendered in the Macclenny Turpentine case all of the taxes ever levied by the Baldwin Drainage District against the other thirty-eight parcels involved in this condemnation suit are wholly void and can never be collected. That results from the state court's present interpretation of the statute, whereas for the other four parcels involved in these appeals, title to which is now claimed by the Drainage District under the federal tax foreclosure decrees, relief has been denied though the taxes levied, as a basis for the present claim of title, were predicated upon the same invalid statute and the same void proceedings. In the case of *State for Use of Groves et al.* v. *Wilkins-Austin Corporation,* .....Fla. ....., 8 So. 2d 275, the Supreme Court of Florida followed the Newkirk case in granting relief against a former decree undertaking to enforce certain drainage district taxes, the statute having been later found to be invalid. The case of *City of Winter Haven* v. *Lake Elbert Citrus Fruit Co.,* 122 Fla. 422, 165 So. 360, 1st headnote and supporting text, is to like effect. These decisions by the Supreme Court of Florida and the above mentioned decisions by this court undoubtedly entitle these petitioners to have relief against the former tax foreclosure decrees and the resulting master's deeds to the Drainage District because the state court has now so construed the drainage statute as to make all the taxes levied by his District utterly void. This is especially so when, as alleged in Section XVIII of petitioners' answer, beginning R. 213, neither the Drainage District nor its bondholders have suffered any prejudice by delay. The allegations of that paragraph, like all the others in the answer of petitioners, were admitted by the attacking motions of the District.

We shall now briefly analyze the order and decision of the state court.

Section V of the amended bill in the Macclenny Turpentine case was substantially the same as Section IV of the answer of petitioners, beginning R. 94. The Circuit Judge held that paragraph not to state a good ground of attack and granted the motion to strike the same, his view being that the original decree of the state court quoted R. 99 to 102 of this record was sufficient to include the plaintiffs' lands (and petitioners' here) within the District even though names of individual owners were not shown by the decree, and even though their individual properties were not described opposite their names.

Section VI of the amended bill in the state court was a substantial copy of Section V of petitioners' answer, R. 104 to 112. Section VI of the amended bill as filed in the state court carried as a statement of the subject-matter the following heading:

> "NOT STATUTORY OR CONSTITUTIONAL TO INCLUDE IN A SINGLE DRAINAGE DISTRICT FOUR SEPARATE AND DISTINCT WATERSHEDS HAVING NO COMMON INTERESTS."

The headings thus given to each individual section of the amended bill were restated as the subject index thereof and certified copy is attached hereto as Appendix A. Section V of petitioners' answer, Section VI of the bill, starts out with the allegation that the Circuit Court of Duval County had no jurisdiction or power under the State Drainage Law or under state or federal constitutions to enter the original decree of January 19th, 1916, including in a single drainage district four separate and distinct watersheds having no common interests, that is to say, noncontiguous in physical conditions, noncontiguous as to flow of water and outlets, noncontiguous as to interests and noncontiguous as to plans of drainage or improve-

ments which might have been proposed or provided for. A description of the several watersheds is then stated as set forth in the record made in that original proceeding. It is further pointed out, R. 109, that to thus construct a drainage district would violate the due process and equal protection clauses of the state and federal constitutions and also violate Sections 28 and 29 of Article XVI of the State Constitution. It is further pointed out bottom R. 109 and first half of R. 110 that large sums of money were wasted or spent on projects in other areas which were of no possible benefit to the lands of respondents (petitioners here) in the Cecil Field area. That large expenditures and waste of money in other watersheds resulted from illegal contracts and other conditions for which the respondents (petitioners here) were not responsible

> "yet the common burdens resulting therefrom and from putting out a second bond issue and even a third bond issue were spread over the lands of these respondents in the Cecil Field area and drainage taxes have been continuously levied from year to year on account thereof, all with the result that these respondents have been deprived of their said properties without due process of law and without equal protection of the laws, contrary to the due process and equal protection clauses of the state and federal constitutions."

It is thus seen that by sustaining Section VI of the amended state bill—Section V of petitioners' answer in this cause—the state court has held that the inclusion of the Yellow Water District watershed of which Cecil Field is a part in the same drainage district along with three other separate and distinct watersheds (or vice versa) was *an unconstitutional application of the state drainage law, with the result that the original state decree so providing was void.* Practically all of the matters pleaded in that behalf are matters of record and therefore there will be little room for the taking of oral testimony or any other sort of evidence outside the record as actually made in

the original state court proceeding. Such a holding means that all of the taxes ever levied by this District were void and unconstitutional from their inception. Among the authorities cited to the state court in support of Section VI of the bill—Section V of the answer here—were *Ocean Beach Heights* v. *Brown-Crummer Invest. Co.*, 302 U. S. 614, *Wurts* v. *Hoagland*, 114 U. S. 606, *Duncan* v. *St. Johns Levee and Drainage District*, 69 F. 2d 342, 8 C. C. A., *Consolidated Land Co.* v. *Tyler*, 88 Fla. 14, 101 So. 280. *Scilley* v. *Red Lodge-Rosebud Irr. Dist.*, (Mont.) 272 Pac. 543, and similar cases.

Subparagraph (b) of Section XV of petitioner's answer, R. 194, made specific complaint that

> "Because said Federal decrees were predicated upon an unconstitutional effort to include the area now known as Cecil Field in a drainage district that would include within its boundaries 4 separate watersheds noncontiguous in conditions and noncontiguous in interests and noncontiguous in possibilities of drainage, all as pointed out in Section V of this answer."

Section VII of the amended bill in the Macclenny Turpentine case was substantially the same as Section VI of petitioners' answer. The state court held this section to be without merit because in his view it was not jurisdictional that the notice of the filing of the commissioners' report carry a list of the properties within the District.

Section VIII of said bill was thus entitled:

> "ASSESSMENTS OF BENEFITS AND DAMAGES NOT MADE AS REQUIRED BY LAW."

That section was substantially the same as Section VII of petitioner's answer, beginning R. 118, except that the latter part of R. 122, all of R. 123 and last half of R. 125 were

omitted and other illustrations substituted with respect to the watershed where the lands of Macclenny Turpentine Company *et al.* are situated. The *bases of attack* are however the same in both pleadings. The holding of the state court refusing to strike that section means that the report of the commissioners and the engineer's report referred to therein show on their faces that the pretended assessments of benefit were wholly arbitrary and unreasonable and that the formulas, theories and processes applied by the commissioners were contrary to the mandates of the statute and contrary to constitutional safeguards. Section 17 of the drainage law of 1913, now Section 1467, Compiled General Laws of Florida, made a legal assessment of benefits and damages a condition precedent to the levy of any drainage tax assessments. Therefore the holding of the state court as to Section VIII of the bill, Section VI of the answer here, goes to the root of the tree and destroys all assessments of every nature ever made by this District.

At top R. 195 specific complaint is made that the Hemphill tax foreclosure decrees were predicated upon those

> "arbitrary, unjust and illegal assessments of benefits."

The decision of the state court held Section IX of the state bill to be without merit and struck the same. That section was a combination of Sections VIII and IX of petitioners' answer. That holding as to Section IX of the state bill is in harmony with the state court's holding as to Section V of the state bill to the effect that it was not necessary for the original decree to show the names of owners or the descriptions of their properties opposite their names.

The state court next proceeded, however, to sustain Sections X, XII and XIV of the state bill, the titles to which sections were respectively as follows:

> "INSTALMENT TAXES, LEVIED FOR NONNEGOTIABLE BONDS ISSUED FOR CONSTRUCTION CONTRACTS LET WITHOUT COMPETITIVE BIDDING, CANNOT BE ENFORCED."
>
> "NO LEGAL INSTALMENT TAXES WERE EVER LEVIED AFTER 1917 BECAUSE ALL CONSTRUCTION WORK DONE AFTER FEBRUARY, 1918, WAS BASED ON UNAUTHORIZED AND ILLEGAL CHANGES AND AMENDMENTS TO THE PLANS OF RECLAMATION AND THE SECOND AND THIRD BOND ISSUES WERE BASED UPON SUCH ILLEGAL CHANGES AND AMENDMENTS, WHEREAS ALL LEVIES OF TAXES WERE BASED ON THE ORIGINAL ASSESSMENTS OF BENEFITS."
>
> "PROPOSED DRAINAGE WORKS AND IMPROVEMENTS NEVER CARRIED OUT OR PUT INTO EFFECT UNDER EITHER THE ORIGINAL PLANS OR THE AMENDED PLANS—PLANS ABANDONED AS A WHOLE AND IN THEIR SEVERAL PARTS."

Those sections were attacked on numerous grounds by the District's motion to strike (see Appendix B hereto). Those three sections of the amended bill were largely copied from Section XI of petitioners' answer beginning with subparagraph (c), R. 142, and from Section XI of petitioners' answer, beginning R. 151. The construction contracts were void for want of competitive bidding as alleged R. 142 and 146. The bonds issued in exchange therefor were nonnegotiable under state statutes and state decisions. See page 9 of our petition in this cause. The amendments to the plans of reclamation evidenced by the maps, Exhibits C, D and E, R. 145 and R. 245 to 249, and as otherwise explained R. 145 to 147, were in direct violation of what are now Sections 1491 and 1500, Compiled General Laws of Florida. The second bond issue and the third bond issue were made to carry out those un-

authorized and illegal changes in the plans of reclamation, chiefly intended for the benefit of watersheds other than the one in which this particular air field is now situated. Thereafter, however, all tax assessments were based on the original pretended assessments of benefits reported in August, 1916, without any reassessments of benefits as specifically required by Section 1500, Compiled General Laws of Florida. *The holding of the state court sustaining said Sections X, XII and XIV of the amended bill means that all tax assessments levied since* 1917, *irrespective of other attacks, are totally void. The state court's holding with respect to the subject-matter of those three sections of the amended bill results from the state court's interpretation of the drainage law as applied to the subject-matter of those sections respectively.* The matters complained of in Sections X, XII and XIV of the state bill, here Sections XI and XII of petitioners' answer, are matters now provable by the records of the District uncovered shortly before this condemnation suit was started.

Tax assessments imposed for illegal contracts and for void bonds and based upon illegal assessments of benefits, are just as bad as if the state court had determined that the drainage statute was void in its entirety.

The above mentioned constructions and rulings of the state court are what the district court held, R. 275, he would wait for as to the thirty eight parcels not affected by the Hempbill tax decrees. *Glenn* v. *Field Packing Co., supra,* and in *Lee* v. *Bickell, supra,* mean that the door of the federal court should be held open to "renew the litigation" in respect to the same illegal taxes which were involved in the Hemphill tax decrees. Otherwise equality in Florida tax matters would be destroyed contrary to *Jackson Grain Co.* v. *Lee,* 139 Fla. 93, *supra,* and *State* v. *Wilkins-Austin Corporation,* 8 So. 2d 275, *supra.*

The state court also sustained Section XIII of the bill, the title to which was as follows:

> "INSEPARABLE PARTS OF INSTALMENT TAXES WHICH WERE LEVIED AGAINST THE PLAINTIFFS' LANDS, AROSE FROM THE EXPENDITURE AND WASTE OF MONEYS IN OTHER WATERSHEDS UNDER ILLEGAL CONTRACTS AND ILLEGAL BONDS ISSUED FOR THE SUPPOSED BENEFIT OF SUCH OTHER WATERSHEDS."

That section was the same in substance as Section XIII of petitioners' answer, R. 163, *et seq.* By sustaining Section XII of the bill the state court in effect held that all of the second bond issue and all of the third bond issue were void. The aggregate levies made as complained of in Section XIII of the bill, also Section XIII of the answer, supplied another cause for the invalidity of all the levies made since the second and third bond issues were put out.

The motion to strike filed by the district did not specifically attack Sections XIV, XV and XVI of the amended bill but at the oral argument the motion was treated as addressed to them also. Therefore the state court's order means that those sections are severally sustained.

POINT VIII.

The court of appeals erred in not sustaining the contention of petitioners to the effect that the chain of facts and circumstances set out in Sections IV to XIII and XVII and XVII-A of their answer made it inequitable and unconscionable for the Drainage District and its present majority bondholders to maintain the claim of title acquired in such manner.

This point was briefly discussed at page 35 of our former petition and brief. Very little notice is given to this point by the brief for respondents but we do find

at page 4 thereof the following statement in regard to the subject-matter:

> "Petitioners have not raised this question in their petition or brief and it is not urged as reason for the writ."

Both angles of this statement are incorrect. The above Point VIII contained in our brief is the answer to the one angle and the "ninth" reason for the writ, stated page 23 of our petition, is the answer to the other angle. The decision of the state court as above explained is another very important reason why a court of equity should exercise its inherent power to intervene in order to prevent a miscarriage of justice see cases cited page 10 of our petition.

The Drainage District voluntarily gave to its answer, R. 61 to 73, two "intendments." One claiming as *tax lienor*. The other claiming as *fee owner*. The weaker of these two must be applied. *U. S.* v. *Linn*, 1 How. 104, 111, 11 L. Ed. 64, 66. *Barco* v. *Doyle*, 50 Fla. 488, 39 So. 103, 1st headnote.

We respectfully submit that the writ of certiorari should issue as prayed for.

THOS. B. ADAMS,
1006 Bisbee Building,
Jacksonville, Florida,
Attorney for Petitioners.

Postscript: Since the preparation of the foregoing brief, in fact after the printing thereof had already been set up, counsel for the respective parties in the case of Macclenny Turpentine Company et al., vs. Baldwin Drainage District et al., agreed that it would be desirable to have the Supreme Court of Florida pass upon the various questions of law ruled on by the Circuit Judge in his Order of April 3rd, 1943, as per Appendix C attached to this brief, whereupon counsel for the defendants in the Macclenny Turpentine Company case prepared a motion

addressed to the Court in that case to defer the filing of an answer by defendants pending an appeal to the Supreme Court of Florida, and counsel for the plaintiff in that case agreed to the order so requested. That a copy of the motion so made is attached hereto as Appendix D. That as a result of said joint decision to seek a review by the Supreme Court of Florida of all the points ruled upon by the Circuit Judge it is expected that the Supreme Court of Florida will at an early date review and decide the various questions already decided by the Circuit Judge.

THOS. B. ADAMS.

APPENDIX A.

In the Circuit Court, in and for Duval County, Florida. Macclenny Turpentine Company, a Florida Corporation, et al., Plaintiffs, v. Baldwin Drainage District, a Purported Public Corporation, R. V. Covington, A. W. Inglis and W. D. Brinson, As Purported Supervisors of Baldwin Drainage District, J. W. Harrell, et al., Defendants. No. 48243-E

Amended Bill of Complaint.

SUBJECT INDEX

State of Florida County of Duval

I, Elliot W. Butts, Clerk of the Circuit Court in and for Duval County, Florida, do hereby certify that the foregoing is a true and correct copy of the subject index to the amended bill of complaint filed in said cause on January 21, 1943.

Witness my hand and official seal of said Court this the 24th day of April, 1943.

(Sgd) Elliot W. Butts

(Court Seal) Clerk of the Circuit Court in and for Duval County, Florida.

(Sgd) By L. W. Thomas
Deputy Clerk.

APPENDIX B.

In the Circuit Court, in and for Duval County, Florida In Chancery No. 48243-E Macclenny Turpentine Company, a Florida, Corporation, et al., Plaintiffs, vs. Baldwin Drainage District, a public corporation, et al., Defendants.

Motion to Strike.

Come now the Defendants herein and move to strike the following portions of the Bill of Complaint for the reasons hereinafter set forth.

1. All of Section 2 of said Bill, because

(a) The issuance of tax deeds by the State of Florida not only did not cancel the taxes levied by said Drainage District, but the purchasers took subject to them.

(b) The Legislature of Florida in 1927 abolished the priority of the lien of State taxes over drainage taxes, and the Bill of Complaint shows that the tax titles of the various Complainants were issued after 1927.

2. All of Section 3, because

(a) The Statute of Limitations is not applicable to liens enforcible in a court of equity, especially liens for special assessments.

(b) The taxes were levied for the benefit of the bondholders of said District, and it appears that the bonds have not been paid.

3. All of Section 5, because

(a) It affirmatively appears from the Bill of Complaint that the notice of application to form said Drainage District was in the form prescribed by the statutes of the State of Florida, and the statute does not prescribe a form of decree organizing the District.

(b) The Bill affirmatively shows that regardless of the validity of the decree, the District has functioned and is still functioning as a *de facto* organization, which issued obligations that were validated by the Court, and the taxes levied for the payment of its debts are the only method by which said debts can be paid.

(c) Complainants seek to attack the validity of the incorporation of the District, and a property owner cannot question the validity of the organization of the District, and the State of Florida and Complainants are estopped from attacking the organization of this District.

4. All of Section 6, because

(a) Complainants seek to collaterally attack a decree of the Circuit Court of Duval County after rights of third parties had been acquired in reliance upon the same.

(b) The Bill of Complaint shows that the matter therein set forth was not made a matter of defense in the proceedings for the organization of the District, and the then owners and all subsequent owners were concluded by the decree of incorporation.

(c) The Bill affirmatively shows that the District was and is a *de facto* District, which is still indebted to its bondholders, and the taxes levied by said District are the only means of paying the same.

5. All of Section 7, because

(a) It affirmatively appears that the notice of filing the Commissioners' Report was in the form required by statute.

(b) It is an attempt to collaterally attack a decree of the Circuit Court twenty-five years after its entry.

(c) Complainants were not property owners in the District at the time of said proceeding, and do not show that they acquired their alleged rights in the property in reliance upon the invalidity of said decree, or without

knowledge of the assessments and taxes levied pursuant thereto.

(d) Complainants are estopped by reason of the facts and circumstances alleged in the Bill from questioning the assessment of benefits to which those who owned lands at the time said proceeding was instituted did not object.

6. All of Section 8, because

(a) Complainants are estopped from attacking the manner in which the benefits were assessed.

(b) Neither those who were, at the time the matters complained of occurred, owners of the property now claimed by the Complainants, nor their successors in title, objected to the special assessments at the time the same were made, or within a reasonable time thereafter.

(c) The facts alleged in said Section were matters that should have been set up by the then owners by way of objection to confirmation of the assessments, and the Bill fails to allege that any objections were filed to confirmation of the report, and more than twenty-five years have elapsed since said report was confirmed.

7. All of Section 9, because

(a) The validity of the taxes levied by the District cannot be questioned by the present owners of said land after the expiration of the time which has expired since the original total tax and the various installments thereof were levied, and after the bonds of the District have been sold.

(b) The form of the certificate attached to a Tax Book cannot invalidate the tax levied if it was levied to pay debts of the District, which is at least a *de facto* if not a *de jure* one, and the Bill shows that taxes were levied for indebtedness incurred by said District in reliance upon the failure of landowners to object thereto.

(c) The statute did not require that the Decree of Incorporation should include a list of the names of the owners of said land.

8. All of Section 10, because

(a) The bonds of the District are negotiable instruments, and facts alleged in said Section relate solely to an alleged equity of the District against the contractors, whose work was finished more than twenty years ago.

(b) The owners of the land at the time the transaction complained of occurred, and at the time the construction work was completed, made no objection to the contract or manner of construction, and no objection has been made by anyone before the filing of this Bill of Complaint, more than twenty-five years later.

9. All of Section 11, because

(a) The bonds of the District are negotiable instruments, and facts alleged in said Section relate solely to an alleged equity of the District against the contractors, whose work was finished more than twenty years ago.

(b) The owners of the land at the time the transaction complained of occurred, and at the time the construction work was completed, made no objection to the contract or manner of construction, and no objection has been made by anyone before the filing of this Bill of Complaint, more than twenty-five years later.

10. All of Section 12, because

(a) The bonds of the District are negotiable instruments, and facts alleged in said Section relate solely to an alleged equity of the District against the contractors, whose work was finished more than twenty years ago.

(b) The owners of the land at the time the transaction complained of occurred, and at the time the construction work was completed, made no objection to the contract or manner of construction, and no objection has

been made by anyone before the filing of this Bill of Complaint, more than twenty-five years later.

11. All of Section 13, because

(a) There is no requirement, statutory or otherwise, that the annual installment levies should be allocated to any particular bond issue, since all levies constituted a pool for the payment *pro rata* of all bonds.

(b) It is immaterial on which part of said District the proceeds of any particular issue was spent, since the District is a corporate unit and its obligations are corporate obligations, and taxes levied for the payment of its bonds were parts of one assessment of benefits and for the construction of a single improvement project.

12. All citations of cases and references to statutes contained in the

Last 11 lines of page 7,
Lines 14, 15, 16 and 17 of page 12,
Lines 6 and 7, and 14, 15 and 16 of page 13,
Lines 14, 15, 16, 17, 18 and 19 of page 28,
Lines 4, 5, 6, 7, 8 and 9 of page 29,
Line 16, and the last 6 lines of page 35,
Lines 14, 15, 16, 17, 18 and the last 3 lines of page 40,
Lines 15 and 16, and the last 3 lines of page 59,
Lines 1 and 2 of page 60,
Lines 15 and 16, and the last 3 lines of page 64,
Lines 14, 15, 16, 17, 18 and 19 of page 89,

because

(a) It is not permissible to include a brief and citations of authorities in a pleading in equity.

(b) Said matter is immaterial and irrelevant to the issues involved in said Bill of Complaint.

(Sgd) Giles J. Patterson
(Sgd) J. W. Harrell
Attorneys for Defendants.

State of Florida Duval County

I, Elliot W. Butts, Clerk of the Circuit Court in and for Duval County, Florida, do hereby certify that the foregoing is a true and correct copy of motion to strike filed by the defendants in said cause January 29th, 1943.

Witness my hand and seal of said Court this the 24th day of April, A. D. 1943.

(Sgd) Elliot W. Butts
Clerk of the Circuit Court
in and for Duval County,
Florida.

(Sgd) By L. W. Thomas
Deputy Clerk.

(Court Seal)

APPENDIX C.

In the Circuit Court of the Fourth Judicial Circuit of the State of Florida in and for Duval County. In Chancery. Case No. 48243-E Macclenny Turpentine Company, a Florida Corporation, et al., Plaintiffs, v. Baldwin Drainage District, a public corporation, et al., Defendants.

Order

This cause came on to be heard upon the amended bill of complaint filed herein on January 21st, 1943, the amendment to Section IV of said amended bill, filed herein on February 5th, 1943, the further amendments to said amendment bill, filed herein on February 26th, 1943, and the several motions to dismiss and the motion to strike parts of said amended bill filed herein January 29th, 1943, which motions to dismiss and to strike are also taken as addressed to said amended bill, as amended, and the Court has heard the arguments and read the briefs submitted by counsel for the respective parties. Upon consideration thereof, it is hereby,

Ordered, Adjudged and Decreed as follows:

1. That the motion to dismiss as to all complaints, the motion to dismiss as to the interests of Emma F. Stokes and Mrs. A. K. Fouraker and the motion to dismiss as to the interests of Eleanor B. Alford Pratt and Elizabeth C. Pace, individually and as Executrix, be and the same are hereby, severally, denied.

2. That the motion to dismiss as to the interests of Nellie C. Bostwick be and the same is hereby granted as to the lands conveyed to her by Herbert Lamson and Perse Gaskins, as Special Masters and described in Section IV, sub-paragraph E, pages 20 to 22 of the amended bill of

complaint, as amended, and said bill is dismissed as to said defendant as to said lands but as to said lands only; and said motion is otherwise denied.

3. That said motion to strike is hereby granted as to Sections III, V, VII, IX and XI of said amended bill, as amended, and said Sections thereof are hereby stricken. Said motion to strike is otherwise denied.

4. That the defendants shall file such answer, or answers, as they may be advised, to said amended bill, as amended, save the parts thereof hereinabove stricken, on, or before, the Rule Day in May, 1943.

Exceptions noted for the respective parties as to all adverse rulings.

Done and Ordered in Chambers, at Jacksonville, Duval County, Florida, this 3rd day of April, 1943.

(Signed) Bayard B. Shields
Judge.

State of Florida, County of Duval

I, Elliot W. Butts, Clerk of the Circuit Court in and for Duval County, Florida, do hereby certify that the foregoing is a true and correct copy of the order of court made in said cause April 3rd, 1943, which said order was thereafter recorded in Chancery Order Book 312, page 217 of the records of said Court.

Witness my hand and the seal of said Court this the 24th day of April, A. D. 1943.

(Sgd.) Elliot W. Butts
Clerk of the Circuit Court
in and for Duval County,
Florida,

(Court Seal)

(Sgd) By L. W. Thomas
Deputy Clerk.

APPENDIX D.

In the Circuit Court, in and for Duval County, Florida. In Chancery. No. 48243-E Macclenny Turpentine Company, a Florida corporation, et al., Plaintiffs, vs. Baldwin Drainage District, a public corporation, et al., Defendants.

Motion

Come now the Defendants in the above entitled cause, and respectfully show to the Court:

1. That the Order of this Court dated April 3, 1943 has in effect ruled adversely to the contentions of the Defendants herein on certain important questions of law which go to the entire merits of the case of the Defendants in some respects, and which in other respects would require the compiling of a lengthy answer and the taking of a great amount of testimony on behalf of both parties in order to enable this Court to enter a Final Decree.

2. The presentation of this case upon the merits at final hearing will be greatly simplified if final disposition can be made of some of the important questions of law decided by the Court adversely to the Defendants.

3. The Defendants, therefore, are desirous of appealing to the Supreme Court and requesting the issuance of a Writ of Certiorari at this time in order to simplify the issues that should be tried before the Circuit Court upon the pleadings of both parties.

4. Complainants have also indicated a desire to likewise appeal to the Supreme Court from rulings made by the Circuit Judge which they conceive to be adverse to their interests.

Wherefore, Defendants move for the entry of an Order by this Court deferring the date upon which De-

fendants shall answer the Bill of Complaint until after the Supreme Court shall have ruled upon the appeals of the respective parties from the interlocutory Order of April 3, 1943.

(Sgd) Giles J. Patterson
(Sgd) John W. Harrell
Attorneys for Defendants.

Such an order approved this Apr. 27, 1943.
(Sgd) Thos. B. Adams,
Atty. for Plffs.